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No. 99 370

In The
Supreme Court of the United States

JOHNNIE LEE EVANS
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Peition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Supreme Court of Illinois erroneously applied the *Strickland* standard in affirming dismissal of petitioner's claim of ineffective assistance based on defense counsel's failure to investigate and introduce at his death penalty sentencing hearing available evidence that he was under the influence of an extreme emotional or mental disturbance at the time of the offense.

2. Whether the Supreme Court of Illinois erroneously applied the *Strickland* standard in affirming dismissal of petitioner's claim of ineffective assistance based on defense counsel's failure to investigate and introduce at his death penalty sentencing hearing other available mitigating evidence.

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CITATIONS OF OPINIONS AND ORDERS

The opinion of the Supreme Court of Illinois affirming dismissal of petitioner's petition for post-conviction relief, 186 Ill. 2d 83, 708 N.E.2d 1158, is set forth in the Appendix at 1. The order of the Supreme Court of Illinois denying petitioner's timely petition for rehearing is unreported and set forth in the Appendix at 29. The order of the Circuit Court of Cook County dismissing petitioner's petition for post-conviction relief is unreported and set forth in the Appendix at 20.

BASIS FOR JURISDICTION IN THIS COURT

The Supreme Court of Illinois entered its judgment on February 19, 1999. The Supreme Court of Illinois denied petitioner's timely petition for rehearing on March 29, 1999. On June 11, 1999, Justice Stevens of this Court granted petitioner's application for extension of time within which to file a petition for writ of certiorari to and including August 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Rule 29.4(b) or (c) of this Court does not apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

> have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Illinois death penalty statute, 720 ILCS 5/9-1, provides, in pertinent part:

> The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. . . . Mitigating factors may include but need not be limited to the following:
>
> . . .
>
> (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution . . .

STATEMENT OF THE CASE

This case involves important constitutional issues under the Sixth Amendment to the Constitution of the United States, as interpreted by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court of Illinois held that petitioner failed to allege a violation of his Sixth Amendment right to effective assistance of counsel at his death penalty sentencing hearing. In so holding, the Supreme Court of Illinois analyzed the merits of petitioner's claims under a standard that is inconsistent with decisions of this Court and other federal courts under *Strickland* and its progeny. This Court should grant a writ of certiorari to rectify this error of the Supreme Court of Illinois.

A. Mr. Evans' Trial

Petitioner, Johnnie Lee Evans, was charged by indictment with the offenses of murder and attempted rape of Adrian Allen on January 22, 1983. (TCR at 3135-3141.) On May 2, 1984, at the conclusion of a jury trial, Mr. Evans was convicted of murder and attempted rape. (TR at 2457, TCR at 3550-3351.) Mr. Evans then waived his right to be sentenced by a jury. (TR at 2461-2463, TCR at 3321.)

Defense counsel asked for a continuance of 30 days so that Mr. Evans could be examined by Dr. Alan K. Rosenwald, a self-employed clinical psychologist, whom trial counsel "expect[ed] . . . to testify in the mitigation phase as a doctor of psychology." (TR at 2464.) The following day, trial counsel presented a written motion for a continuance so that Mr. Evans could be examined by psychological and possibly psychiatric personnel. (TCR at 3352, TR at 2470-2473.) At a hearing on the motion, the court inquired as to the purpose of the examination. (TR at 2471.) Trial counsel responded: "[j]udge, it would go to the indicia -- miti-

gation. I believe one of the factors in mitigation is that extreme mental, emotional distress." *Id.* The court granted the motion for a continuance "because of the severity of the case." (TR at 2472.)

At the penalty phase of Mr. Evans' sentencing hearing, defense counsel presented two witnesses: Mr. Evans testified on his own behalf, and Dr. Rosenwald testified on behalf of Mr. Evans. (TR at 2816-2965, 2966-2970.) Mr. Evans described his upbringing, limited education, attempts to find employment, his marriage and the loss of his children. Mr. Evans asked the court to spare his life. (TR at 2904.) He said that he was sorry for the crimes that he had committed. (TR at 2919.)

Dr. Rosenwald testified that, at the request of defense counsel, he examined Mr. Evans for approximately three hours, during which time he administered the Rorschach ink blot test, the Vanlennep 4-picture test, and a projective sentence completion test. (TR at 2970-2973.) Dr. Rosenwald spent an additional six to eight hours scoring the tests and interpreting the results. (TR at 2974, 3000-3001.) Dr. Rosenwald testified that Mr. Evans suffers from "a kind of psychopathology in the sexual area." (TR at 2992.)

Defense counsel asked Dr. Rosenwald whether he was "able to a degree of reasonable certainty, able to determine whether or not Mr. Evans is acting under an extreme emotional or mental distress." (TR at 2993.)[1] Dr. Rosenwald replied:

---

[1] The incongruities between counsel's question and the pertinent statutory language manifest the lack of preparation that went into Dr. Rosenwald's examination. Specifically, counsel did not ask Dr. Rosenwald whether Mr.

> Well, if extreme is chronic, I have trouble with the term extreme. I think this is a long-standing mental disturbance, and that consequently there would be periods of time where he would be acting under extreme duress. That he has been chronically ill for many years.

Id.

On cross-examination, Dr. Rosenwald admitted that he had not been asked to evaluate whether Mr. Evans was acting under the influence of mental or emotional disturbances at the time of the Allen murder:

> Q. Doctor, this is my last question. *Were you ever asked to consider whether or not the defendant at the time that he committed a murder was under the influence of an extreme emotional or mental disturbance?* Were you ever asked to consider that particular point?
>
> A. *Today*, yes.
>
> Q. You were?
>
> A. Yes.
>
> Q. Well, you don't have any conclusion as to that in your report, do you?

Evans "*was* acting under the influence of extreme mental or emotional *disturbance at the time of the offense*." 720 ILCS 5/9-1(c)(2) (emphasis added). Rather, counsel asked Dr. Rosenwald whether Mr. Evans "*is* acting under an extreme emotional or mental *distress*." (TR at 2993) (emphasis added).

A. No.

Q. But you were asked to actually consider that?

A. *I was not asked to include that in my report.*

Q. Oh, you were not asked to include that in your report, *but you were initially asked to make that determination, weren't you?*

A. *I don't believe that.* I believe if I recall correctly that was true in most psychological cases that *I was asked to evaluate personality characteristics of Mr. Evans.*

* * *

Q. Have you ever testified at a death penalty hearing before today?

A. Yes.

Q. Were you ever shown the criminal statutes regarding mitigation?

A. Yes.

Q. And you are aware, are you not, Doctor, that one factor in mitigation set out in the statute is whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance?

A. Yes.

Q. And in addition to that, although not such as to con itute a defense to prosecution, you are familiar with that paragraph, aren't you?

A. Yes.

Q. And, Doctor, *weren't you told that that was the purpose of your examination in the first place?*

A. *I was told that the purpose of my examination was the death penalty was being considered. I was not told specifically to look for what particular circumstances might underlie that.*

Q. You understand today, though, that you are testifying as a death penalty hearing, correct?

A. I understand that.

Q. And you do not have any opinion at this time, number one, when the defendant committed a murder he was under any influence of extreme mental or emotional --

A. I believe, counsel, that referring back to the comments I made earlier, I indicated that it was highly probable that Mr. Evans was under emotional factors which could contribute to the crimes that he committed. *That I questioned that I wasn't clear in my own mind what is meant by extreme.*

(TR at 3029-3031) (emphasis added).

At the close of the sentencing hearing, the trial court found that Mr. Evans was not acting under the influence of an extreme mental or emotional disturbance at the time of the offense and there were no mitigating circumstances or factors sufficient to preclude the imposition of the death sentence. (TR at 3101-3102.) Accordingly, the court sentenced Mr. Evans to death. (TR at 3102, 3408.)

B. Mr. Evans' Direct Appeal to the Supreme Court of Illinois

On direct appeal to the Supreme Court of Illinois, Mr. Evans argued, among other things, that the trial court improperly rejected evidence of extreme mental or emotional disturbance as a mitigating factor precluding the death penalty. *People v. Evans*, 125 Ill. 2d 50, 86, 530 N.E.2d 1360, 1375 (1988). The Supreme Court of Illinois held that the trial court did consider Mr. Evans' "alleged mitigating evidence," but that the trial court "specifically found that the murder of Adrian Allen was not committed while defendant was acting under extreme or emotional disturbance." *Id.* at 88, 530 N.E.2d at 1376. The Supreme Court of Illinois refused to disturb the trial court's finding on this point, noting:

> Significantly, nowhere in his testimony does Dr. Rosenwald specifically state that defendant operated under extreme mental or emotional disturbance at the time he committed the offense. At most, he testified that defendant "was under emotional factors which *could* contribute to the crimes."

Id. (emphasis added.)

The Supreme Court of Illinois also distinguished cases in which the trier of fact failed to consider uncontradicted evidence pertaining to a mitigating circumstance, noting that Mr. Evans had presented *no* evidence that he acted under the influence of an extreme mental or emotional disturbance at the time of the offense:

> Here, however, defendant simply failed to establish the *existence* of the mitigating factor by *any* evidence - uncontradicted or otherwise. He presented no testimony whatever that he

> operated under an *extreme* mental or emotional disturbance *at the time of the offense*, as required by the statute.

Id. at 89, 530 N.E.2d at 1377 (emphasis in original). Thus, the Supreme Court of Illinois affirmed Mr. Evans' convictions and sentences. *Id.* at 99, 530 N.E.2d at 1382. This Court denied Mr. Evans' petition for a writ of certiorari. *Evans v. Illinois*, 490 U.S. 1113 (1989).

C. Mr. Evans' Petition for Post-Conviction Relief

Mr. Evans filed his petition for post-conviction relief on June 27, 1990. (CR at C-11) In his amended petition, Mr. Evans alleged five violations of his constitutional rights at the original trial and sentencing hearing. Among other things, Mr. Evans alleged that he was denied the effective assistance of counsel at the penalty phase of the sentencing hearing based on his counsel's failure to: (1) investigate and present evidence that he was acting under the influence of an extreme mental or emotional disturbance at the time of the murder; and (2) investigate and present other mitigating evidence.

Mr. Evans' claims were supported by affidavits and other documents which contained significant new evidence, not produced at the original trial. Much of this was mitigating evidence which was not presented during the penalty phase of the sentencing proceeding. In particular, Arlene Messner-Peters, a licensed clinical social worker, for the first time presented a thorough social history of Mr. Evans. To prepare this social history, Ms. Messner-Peters obtained documents reflecting Mr. Evans' medical, educational, employment and family background. Appendix ("App.") at 32-34. Ms. Messner-Peters also interviewed Mr. Evans, two of his sisters, his wife and his wife's sister and re-

viewed written summaries of interviews of Mr. Evans' cousin and a former school teacher. App. at 32. The social history prepared by Ms. Messner-Peters included the following:

Mr. Evans was born on February 23, 1951 in Delaware, the fourth of eight children born to Ethel Mae Evans. App. at 34. Mr. Evans never met, or knew the identity of, his biological father. He was told that he was conceived when his father raped his mother. Shortly after his birth, Mr. Evans' mother gave him away. *Id.*

As a young child, Mr. Evans was raised by his great-aunt, Annie Kelly. Ms. Kelly, a migrant farm worker, was a violent and aggressive person. She physically abused him. App. at 35-36. Mr. Evans also lived from time to time with Ms. Kelly's daughter and her family. Life in this household was chaotic and chaotic. The children engaged in inappropriate sexual conduct. Mr. Evans was frequently reminded that he was not wanted, that he ate too much or was too much of a burden. App. at 36-37.

At age 14, Mr. Evans was sent to live with his mother and her other children in a housing project in Chicago. Incest and inappropriate sexual behavior were common in this household as well. App. at 39. Around age 15, Mr. Evans began to abuse alcohol as a way to escape from his environment and from himself. He drank to intoxication every day. Around age 18, he began using drugs heavily. App. at 39, 44.

Mr. Evans' education was intermittent. He dropped out of school after eighth grade. App. at 41.

From infancy, Mr. Evans had a congenital cataract in his left eye. At age 10, his eye was removed. App. at 38-39. Mr. Evans' visual disability, slight stature, limited education and emotional and psychological problems made

it difficult to him to find work. Nevertheless, as a young man, he made efforts to find employment. App. at 41-42.

In approximately 1970, Mr. Evans moved in with Betty Ann Clanton Pruitt, a young woman with a history of mental illness. Their son, Johnnie Lee, was born in 1971; a second son was born two years later. In 1974, while Mr. Evans was in jail on charges which were later dropped, the children were removed from the home because of abuse or neglect. App. at 43-44.

Following his release from prison, Mr. Evans' life continued to deteriorate. On the day of the Allen murder, he was again living with his mother, where he was not wanted. He was hungry, intoxicated, and had smoked marijuana and had used PCP. App. at 44.

Ms. Messner-Peters concluded that the chronic physical, sexual and emotional abuse Mr. Evans suffered had lifelong effects on his emotional and social development, including the association of love with violence and the inability to function under stress without aggression. And, as a result of the chronic sexually abusive and inappropriate behavior to which Mr. Evans was exposed from childhood on, Mr. Evans suffers from extremely low self-esteem and the inability to establish appropriate sexual boundaries with people with whom he interacts. App. at 45.

Ms. Messner-Peters further concluded that Mr. Evans entered adolescence and adulthood without the educational and social skills necessary to function successfully in society. The absence of these skills was exacerbated by the physical disability of his blindness in his left eye. As a result of Mr. Evans' chronic drug and alcohol abuse and his lack of education, Mr. Evans was unable to find suitable employment. Mr. Evans' social history presented him with

overwhelming obstacles for which he received inadequate assistance throughout his life. The combination of Mr. Evans' drug and alcohol addiction and his entry into adulthood with extremely limited abilities made his contacts with the criminal justice systems almost an inevitability. App. at 45-46.

In addition, the claims in the amended petition were supported by the affidavit of Gerard J. Girdaukas, Ph.D., a clinical psychologist. Dr. Girdaukas reviewed Mr. Evans' social history and administered a complete battery of intellectual, neuropsychological and personality tests. App. at 48-49.

The results of intelligence testing indicated that Mr. Evans is not psychotic or retarded but has significant and diffuse neurological impairments, probably chronic and longstanding. App. at 53-54. These neurological impairments are attributable to his chronic abuse of drugs and alcohol, together with the documented head trauma during his childhood. *Id.* They are indicated by Mr. Evans' long-term memory deficits, multiple incidents of head injury and trauma, his history of alcohol and drug abuse and his test results. *Id.*

Mr. Evans' performance on intelligence tests indicates that his ability to problem-solve by anticipating various alternatives and choosing the most appropriate is significantly impaired. His problem solving process can be characterized as an action-oriented one in which a course of conduct is chosen impulsively. App. at 54-55.

Overall, the test results indicated serious and significant impairments of Mr. Evans' brain functioning. An orbital frontal syndrome is possible. Damage to the frontal lobes impairs the ability to control impulses and increases the incidence of sexual and violent behaviors. App. at 56.

The impulse disorder from which Mr. Evans suffers, which was demonstrated in his aberrant sexual behavior, resulted from a combination of organic brain impairment, which reduces impulse control and inhibits the generation of appropriate responses to his feelings of depression and abandonment; his dysfunctional sexual history, marked by sexual abuse and exposure to inappropriate sexual behavior at a very early age; and the use of mind-altering drugs on the day of the offenses. These drugs, namely, PCP and alcohol, are well known for their powerfully disinhibiting effects, in particular sexual and aggressive impulses. App. at 58.

Both Ms. Messner-Peters and Dr. Girdaukas concluded that because of Mr. Evans' neurological impairments, his psychological and personality profile, his intellectual and emotional deficits, and his use of drugs and alcohol, on January 22, 1983, Mr. Evans was under the influence of extreme mental and emotional disturbance, and his capacity to conform his conduct to the requirements of the law was substantially impaired. App. at 57-58, 45-46.

Finally, Mr. Evans' claims were supported by the affidavit of Dr. Rosenwald. Specifically, Dr. Rosenwald stated:

> When I was asked my expert opinion as to whether Johnnie Lee Evans was acting under the influence of extreme mental or emotional disturbance when the murder was committed, I was unable to couch my opinion in the language referred to because I did not have a definition of the term extreme and it is not a term generally used in my field of expertise.
>
> If extreme mental or emotional disturbance is defined as less than insanity but more than the

> emotions of an average man, however inflamed, then I have no hesitancy in giving my expert opinion that Johnnie Lee Evans was acting under the influence of extreme mental or emotional disturbance when the murder was committed.
>
> If the term extreme is defined as very great, intense, or very severe, I have no hesitancy in giving my expert opinion that Johnnie Lee Evans was acting under the influence of extreme mental or emotional disturbance when the murder was committed.

App. at 63-64.

D. Proceedings on Mr. Evans' Petition for Post-Conviction Relief

On May 17, 1997, the circuit court dismissed Mr. Evans' petition in its entirety, without holding an evidentiary hearing. (R at E-4 - E-6; CR at C-186.) The court stated that Mr. Evans had failed "to raise any substantial violation of the constitution." (CR at C-194.) Specifically, the court found that, with respect to Mr. Evans' ineffective assistance of counsel claims, trial counsel had not been deficient (CR at C-190, C-191, C-193), and even if Mr. Evans had received deficient representation, he was not prejudiced by these errors. (CR at C-190, C-193).

Mr. Evans appealed the dismissal of his post-conviction petition to the Supreme Court of Illinois. On February 19, 1999, the Supreme Court of Illinois affirmed the circuit court's dismissal of Mr. Evans' petition, finding that the petition failed to allege either the performance or the prejudice prong of his ineffective assistance claims. Specifically, as to Mr. Evans' claim that he was denied effective assistance by counsel's failure to introduce evidence

that he was acting under extreme emotional or mental disturbance at the time of the offense, the Supreme Court of Illinois absolved counsel's inaction on the rationale that such evidence would have been inconsistent with Mr. Evans' testimony at the sentencing hearing, in which he denied involvement in the crime:

> Should trial counsel have presented a defense that contradicted defendant's protestations of innocence? Should counsel have labeled their client a liar so they could additionally label him a murderer who acted under an extreme emotional disturbance? Rather, closing argument reveals that trial counsel's sentencing strategy was to portray defendant as the neglected and unwanted victim of an abusive childhood, who raped women in a misguided quest for love.

App. at 11. The Supreme Court of Illinois also rejected Mr. Evans' claim that he was denied effective assistance by counsel's failure to introduce other mitigating evidence, concluding that such evidence would have been cumulative to the other mitigating evidence offered at sentencing. App. at 14-17.

On March 12, 1999, Mr. Evans filed a timely petition for rehearing, which the Supreme Court of Illinois denied on March 29, 1999. App. at 29.

ARGUMENT IN SUPPORT OF THE PETITION

The Counsel Clause of the Sixth Amendment mandates that in "all criminal prosecutions" the accused shall "have the assistance of counsel for his defense." U.S. Const. amend. VI. This constitutional guarantee does not require simply that a lawyer be present at trial alongside a defendant, but rather "the right to counsel is the right to ef-

fective assistance of counsel." *McMann v. Richardson*, 387 U.S. 759, 771 n.14 (1970).

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set forth a two-prong test for determining whether an attorney's performance at a capital sentencing hearing meets this constitutional requirement. First, a defendant must show that counsel's performance was "deficient." *Id.* at 687. Deficiency is demonstrated by error committed by counsel that falls below an objective standard of reasonableness. *Id.* at 688. Second, the defendant must show that counsel's performance prejudiced the defense. Prejudice is demonstrated where "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different" -- here, that the sentencer would have concluded that the balance of aggravating and mitigating factors did not warrant death. *Id.* at 694-95.

Numerous federal courts have determined that *Strickland* requires defense counsel to investigate and introduce mitigating evidence at the sentencing phase of a death penalty case. Specifically, courts have ruled that the failure to investigate and present a defense based upon the defendant's impaired mental capacity violates the *Strickland* standard outright, or at least warrants an evidentiary hearing. *See infra* at 22-23. As set forth more fully below, the Supreme Court of Illinois erred in its application of the *Strickland* standard to Mr. Evans' claims of ineffective assistance. This Court should grant a writ of certiorari to review and correct this error.

I. The Decision of the Supreme Court of Illinois on Mr. Evans' Claim of Ineffective Assistance Based on Counsel's Failure to Investigate and Introduce Available Evidence of Extreme Emotional or Mental Disturbance is Inconsistent with *Strickland* and Its Progeny

Under the Illinois death penalty statute, the sentencer is to consider "any aggravating and any mitigating factors which are relevant to the imposition of the death penalty." 720 ILCS 5/9-1(c). Further, the statute explicitly directs the sentencer to consider whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution. 720 ILCS 5/9-1(c)(2). Here, such evidence was available, but trial counsel failed to introduce it at the sentencing hearing. The Supreme Court of Illinois erred in affirming the dismissal of Mr. Evans' claim that he was denied effective assistance by counsel's failure to present such evidence.

A. Mr. Evans' Counsel Failed to Investigate and Introduce Available Evidence That Mr. Evans Was under the Influence of an Extreme Emotional or Mental Disturbance at the Time of the Offense

As detailed more fully above, defense counsel utterly failed to investigate and introduce the wealth of available evidence that Mr. Evans was under the influence of an extreme emotional or mental disturbance at the time of the offense. Had trial counsel performed competently, they would have presented such evidence at Mr. Evans' sentencing hearing.

The affidavits of Dr. Girdaukas and Ms. Messner-Peters establish that Mr. Evans was acting under the influ-

ence of extreme mental or emotional disturbance at the time of the Allen murder. Dr. Girdaukas, a clinical psychologist, conducted a battery of intellectual, neuropsychological and personality tests on Mr. Evans and reviewed his social history. App. at 53-54. Based on the test results and the social history, Dr. Girdaukas concluded:

> In my opinion, which I hold to a reasonable degree of certainty in my profession, the above-described neurological impairments, the psychological and personality profile, and the intellectual and emotional deficits existed on January 22, 1983. These conditions in combination with the ingestion of alcohol and drugs resulted in significant difficulties in cognition, that is, in the abilities to appreciate and understand fully the long term consequences of one's actions, to utilize appropriate judgment, and to control one's impulses. Mr. Evans reported that on the day of the offenses, his mother was very sick and there was no food in the house. Based upon the available data, including test results, interview data, the client's presentation and social history, *it is my opinion, which I hold with a reasonable degree of certainty in my profession, that at the time of the offense Mr. Evans was under extreme mental and emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired.*

App. at 57-58 (emphasis added).

Ms. Messner-Peters, a licensed clinical social worker, reached a similar conclusion. Based on her inves-

tigation into and evaluation of Mr. Evans' social history and background, she agreed with Dr. Girdaukas, concluding:

> In my professional opinion, which I hold to a reasonable degree of certainty in my profession . . . *Mr. Evans was under extreme mental and emotional disturbance at the time of the offenses*. The combination of Mr. Evans' drug and alcohol addiction and his entry into adulthood with extremely limited abilities renders his contacts with the criminal justice system almost an inevitability.

App. at 45-46 (emphasis added).

Finally, Dr. Rosenwald himself -- had he been properly advised and prepared by defense counsel -- would have testified that Mr. Evans was under the influence of an extreme emotional or mental disturbance at the time of the offense. App. at 63-64.

Trial counsel's failure to investigate, obtain and present evidence that Mr. Evans was under the influence of extreme mental or emotional disturbance at the time of the offenses falls below any standard of reasonableness. After asking for a continuance for exactly this purpose (TR at 2471), trial counsel did not ask Dr. Rosenwald to evaluate whether Mr. Evans was acting under extreme mental or emotional disturbance at the time of the offenses. Nor did they explain the meaning of this phrase or relevance of this issue to Dr. Rosenwald. Indeed, their lack of preparation on this issue is demonstrated by their failure to pose a proper question on this issue at the sentencing hearing. (TR at 2993.)

B. There is a Reasonable Probability that, but for Defense Counsel's Failure to Investigate and Introduce Available Evidence that Mr. Evans Was Under the Influence of Extreme Mental or Emotional Disturbance at the Time of the Offense, Mr. Evans Would Not Have Been Sentenced to Death

The trial court's comments in imposing the death penalty demonstrate the prejudice Mr. Evans suffered due to his counsel's deficiencies. In its analysis of mitigation, the trial court specifically found that Mr. Evans was not acting under the influence of extreme mental or emotional disturbance at the time of the offense. (TR at 3101-3102.) Unaware of the evidence supporting this mitigating factor, the trial court found that there were no mitigating circumstances sufficient to preclude the imposition of the death penalty. *Id.* The trial court then sentenced Mr. Evans to death. (TR at 3102, 3408.)

Further, in affirming Mr. Evans' conviction and sentences, the Supreme Court of Illinois found that Mr. Evans "presented no testimony whatever that he operated under an *extreme* mental or emotional disturbance *at the time of the offense*, as required by the statute." *Evans*, 125 Ill. 2d at 89, 530 N.E.2d at 1377 (emphasis in original). Accordingly, but for counsel's failure to investigate and introduce available evidence that Mr. Evans was under the influence of an extreme emotional or mental disturbance at the time of the offense, there is a reasonable probability that he would not have been sentenced to death.

C. The Supreme Court of Illinois Misapplied the *Strickland* Standard to Mr. Evans' Claim of Ineffective Assistance

The Supreme Court of Illinois affirmed the dismissal of Mr. Evans' claim of ineffective assistance by hypothesizing that trial counsel's failure to introduce evidence at sentencing that Mr. Evans was acting under an extreme emotional or mental disturbance at the time of the offense may have been the product of strategy. Specifically, the Court implied that trial counsel rejected the extreme mental or emotional disturbance theory after Mr. Evans, on cross examination, denied involvement in the murder. The Court stated:

> Should trial counsel have presented a defense that contradicted defendant's protestations of innocence? Should counsel have labeled their client a liar so they could additionally label him a murderer who acted under an extreme emotional disturbance? Rather, closing argument reveals that trial counsel's sentencing strategy was to portray defendant as the neglected and unwanted victim of an abusive childhood, who raped women in a misguided quest for love.[2]

App. at 11.

The hypothesis of the Supreme Court of Illinois -- that counsel's failure to investigate and introduce evidence of extreme emotional or mental disturbance may be attrib-

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[2] Such a sentencing strategy would have been both inconsistent with a protestation of innocence and insufficient to establish a statutory mitigating factor.

uted to strategy -- is belied by the record. During trial counsel's direct examination of Mr. Evans, she made no attempt whatsoever to elicit testimony that would support a theory of innocence or alibi. Nor did trial counsel call any other witnesses that would support such a theory. The very fact that trial counsel retained Dr. Rosenwald manifests their decision to present a theory of extreme emotional or mental disturbance, rather than to present a theory of innocence. If trial counsel had determined to present a defense of innocence or alibi, Dr. Rosenwald's testimony would have been wholly irrelevant to and inconsistent with that defense. Finally, trial counsel's closing argument -- after Mr. Evans had testified -- nowhere attempts to establish an innocence or alibi defense; rather, counsel argued that the "basic reason" why Mr. Evans should not receive the death sentence was because he was acting under an extreme emotional or mental disturbance at the time of the offense. (TR 3074.) These facts make clear that trial counsel did not elect to present a defense of innocence or alibi.

Moreover, the reasoning of the Supreme Court of Illinois ignored the well-established principle that counsel's failure to investigate and introduce available evidence of mental impairment at the sentencing stage of a capital case violates *Strickland*, or at least warrants an evidentiary hearing. *See Wallace v. Stewart*, No. 97-99016, 1999 WL 511348, at *3 (9th Cir. July 21, 1999) (remanding for evidentiary hearing on claim of ineffective assistance at capital sentencing; "[d]oes an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes."); *Caro v. Calderon*, 165 F.3d 1223, 1227-28 (9th Cir.) (same; counsel failed to introduce evidence that defendant had been exposed to neurotoxicants and suffered from diminished mental capacity),

cert. denied, 119 S. Ct. 2414 (1999); *Correll v. Stewart*, 137 F.3d 1404, 1414-15 (9th Cir.) (same; counsel failed to introduce evidence of defendant's mental health history and psychiatric condition at the time of the offense), *cert. denied*, 119 S. Ct. 450 (1998); *Hendricks v. Calderon*, 70 F.3d 1032, 1043-44 (9th Cir. 1995) (affirming grant of writ of habeas corpus on claim of ineffective assistance at capital sentencing where counsel failed to introduce evidence of defendant's hard childhood and psychiatric and drug problems), *cert. denied*, 517 U.S. 1111 (1996); *Glenn v. Tate*, 71 F.3d 1204, 1210-11 (6th Cir. 1995) (granting writ of habeas corpus on claim of ineffective assistance at capital sentencing where counsel failed to introduce evidence of defendant's social history and organic brain damage), *cert. denied*, 519 U.S. 910 (1996); *Antwine v. Delo*, 54 F.3d 1357, 1367-68 (8th Cir. 1995) (same; counsel failed to introduce evidence that defendant suffered from bipolar disorder), *cert. denied*, 516 U.S. 1067 (1996); *Hill v. Lockhart*, 28 F.3d 832, 846-47 (8th Cir. 1994) (affirming grant of writ of habeas corpus on claim of ineffective assistance at capital sentencing where counsel failed to introduce available evidence supporting statutory mitigating factor of extreme emotional or mental disturbance), *cert. denied*, 513 U.S. 1102 (1995); *Loyd v. Whitley*, 977 F.2d 149, 159-61 (5th Cir. 1992) (granting writ of habeas corpus on claim of ineffective assistance at capital sentencing where counsel failed to investigate and introduce available evidence supporting statutory investigating factors of mental or emotional disturbance or mental disease or defect), *cert. denied*, 508 U.S. 911 (1993); *Brewer v. Aiken*, 935 F.2d 850, 858-59 (7th Cir. 1991) (affirming grant of writ of habeas corpus on claim of ineffective assistance at capital sentencing where counsel failed to investigate evidence of defendant's psychiatric history, which would have supported statutory mitigating factor of extreme mental or emotional disturbance).

Accordingly, the Supreme Court of Illinois erred in its application of *Strickland* to Mr. Evans' claim that he was denied effective assistance by counsel's failure to introduce evidence that he was acting under extreme emotional or mental disturbance at the time of the offense, and this Court should grant a writ of certiorari to review and correct this error.

II. The Decision of the Supreme Court of Illinois on Mr. Evans' Claim of Ineffective Assistance Based on Counsel's Failure to Investigate and Introduce Other Available Mitigating Evidence Is Inconsistent with *Strickland* and Its Progeny

The Illinois death penalty statute provides that, in deciding whether to impose the death penalty, the court "shall consider . . . any mitigating factors which are relevant to the imposition of the death penalty." 720 ILCS 5/9-1(c). Here, the only evidence presented by trial counsel in mitigation were the testimony of Dr. Rosenwald, discussed above, and the testimony of Mr. Evans himself. The Supreme Court of Illinois erred in affirming the dismissal of Mr. Evans' claim that he was denied effective assistance by counsel's failure to investigate and introduce other available mitigating evidence at his sentencing hearing.

Had trial counsel performed competently they would have obtained a social history containing the facts set forth in the affidavit of Arlene Messner-Peters, as well as the neorpsychological examination of Dr. Girdaukas. Adequate investigation into and presentation of this mitigating evidence would not have simply resulted in the presentation of the same information at the sentencing hearing. A thorough investigation has uncovered additional mitigation, such as the multiple incidents of head trauma, evidenced by scarring on Mr. Evans' head, the inappropriate sexual behavior in each of the households in which he was

raised and Mr. Evans' chronic abuse of alcohol and drugs. In addition, the affidavit of Ms. Messner-Peters not only sets forth Mr. Evans' life story, but, for the first time, explains how those experiences affected his development and, in her words, "render[ed] his contacts with the criminal justice system almost an inevitability." App. at 46. She explains that the chronic physical, sexual and emotional abuse which Mr. Evans suffered caused him to associate love with violence and to be unable to function under stress without aggression. She also explains that Mr. Evans' exposure to sexually abusive and inappropriate behavior resulted in his inability to establish appropriate sexual boundaries with people with whom he interacts. Similarly, Dr. Girdaukas' affidavit contains, for the first time, the results of comprehensive intellectual, neuropsychological and personality tests and, more importantly, diagnoses based on those results. Dr. Girdaukas explains that Mr. Evans suffers from an impulse disorder as a result of organic brain impairment, his dysfunctional sexual history, and his use of alcohol and drugs.

The Supreme Court of Illinois defended counsel's failure to investigate and introduce this plethora of mitigating evidence on the ground that the evidence was both "cumulative to defendant's extensive mitigation testimony" and "not inherently mitigating." App. at 16. Again, as with Mr. Evans' claim that he was denied effective assistance based on counsel's failure to introduce evidence of extreme emotional or mental disturbance, the Court's analysis of Mr. Evans' claim based on counsel's failure to introduce other mitigating evidence runs afoul of the *Strickland* standard, under which the failure to investigate and introduce such evidence warrants habeas relief or at least an evidentiary hearing. The cases are legion. *See Hall v. Washington*, 106 F.3d 742, 749-50 (7th Cir.) (granting writ of habeas corpus on claim of ineffective assistance at sentenc-

ing; "[t]his does not mean that only a scorch-the-earth strategy will suffice . . . [but] [w]here it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate will be ineffective assistance"), *cert. denied*, 118 S. Ct. 264 (1997); *Clabourne v. Lewis*, 64 F.3d 1373, 1384-87 (9th Cir. 1995) (defendant was prejudiced by defense counsel's failure to prepare and present mitigating evidence of defendant's history of mental illness); *Antwine*, 54 F.3d at 1365-68 (death penalty vacated where counsel failed to more fully investigate his client's mental condition even though counsel obtained a court ordered mental examination of defendant by a state psychiatrist that indicated that defendant's odd behavior was due to drugs and not a mental disease or defect); *Baxter v. Thomas*, 45 F.3d 1501, 1512-15 (11th Cir.) (where counsel investigated defendant's background, but failed to take any steps to uncover mental health mitigating evidence that was readily available from school records and interviews of family and friends, counsel was ineffective and death penalty was reversed), *cert. denied*, 516 U.S. 946 (1995); *Parkus v. Delo*, 33 F.3d 933, 938-39 (8th Cir. 1994) (ineffective assistance claim stated where counsel performed inadequate investigation into petitioner's mental health history and a "reasonable probability exist[ed] that the jury, if given the opportunity to consider defendant's mental condition, would not have convicted him"); *Buenoano v. Singletary*, 963 F.2d 1433, 1437-38 (11th Cir. 1992) (allegations that counsel "failed to investigate, discover, and present mitigating evidence concerning [petitioner's] background and mental health" stated a claim for ineffective assistance); *Brewer*, 935 F.2d at 857 (defense counsel's failure to investigate defendant's mental history demonstrates conclusively that he did not "make a significant ef-

fort, based on reasonable investigation and logical argument," to present mitigation) (citation omitted); *Kenley v. Armontrout*, 937 F.2d 1298, 1304-09 (8th Cir. 1990) (death sentence vacated where counsel failed to investigate and present evidence of defendant's alcohol problems and personality disorder, even though the disorder "f[e]ll short of a mental defect or disease"), *cert. denied*, 502 U.S. 964 (1991); *Deutscher v. Whitley*, 884 F.2d 1152, 1159-61 (9th Cir. 1989) (where attorney knew that defendant "must have had some sort of mental problem," yet "completely failed to pursue the possibility of presenting mitigating evidence of mental impairment," decision not to investigate was not tactical and "counsel's performance was deficient"); *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir.) (counsel was deficient in failing to investigate mitigating evidence), *cert. denied*, 493 U.S. 874 (1989); *Evans v. Lewis*, 855 F.2d 631, 636 (9th Cir. 1988) (deficient performance where counsel knew his client had some sort of mental problems, but "conducted no investigation to ascertain the extent of any possible mental impairment"); *Stephens v. Kemp*, 846 F.2d 642, 652 (11th Cir.) (trial counsel's failure to "investigate, present and argue" evidence of defendant's mental history and condition "constituted error 'so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment'") (citations omitted), *cert. denied*, 488 U.S. 872 (1988); *Middleton v. Dugger*, 849 F.2d 491, 493-95 (11th Cir. 1988) (attorney who failed to request psychiatric records that reflected defendant's troubled background and history of mental illness did not conduct a reasonable investigation and, thus, defendant was entitled to a new sentencing hearing).

CONCLUSION

Accordingly, the Supreme Court of Illinois misapplied the *Strickland* standard to Mr. Evans' claim of ineffective assistance based on counsel's failure to investigate and introduce other available mitigating evidence. This court should grant a writ of certiorari to review and correct this error.

Respectfully submitted,

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No. 99 370

In The
Supreme Court of the United States

JOHNNIE LEE EVANS
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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No. 83457

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

JOHNNIE LEE EVANS,
Appellant.

Opinion Filed February 19, 1999

CHIEF JUSTICE FREEMAN delivered the opinion of the court:

Defendant, Johnnie Lee Evans, petitioned the circuit court of Cook County for relief pursuant to the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq*, (West 1996). The circuit court dismissed defendant's amended petition without an evidentiary hearing. Defendant appeals directly to this court. 134 Ill. 2d R. 651(a). We affirm.

BACKGROUND

In defendant's direct appeal, this court recited the details of his crimes. See *People v. Evans*, 125 Ill. 2d 50 (1988). We need not repeat those details here. Defendant was charged with, *inter alia*, the knowing, intentional, and felony murder (Ill. Rev. Stat. 1983, ch. 38, pars. 9-1 (a)(1), (a)(2), (a)(3)) and the attempted rape (Ill. Rev. Stat. 1983, ch. 38, pars. 8-4, 11-1) of 16-year-old Adrian Allen. At the close of the evidence, the jury returned general verdicts of guilty of murder and attempted rape.

Defendant waived a sentencing jury. At the first stage of the death sentencing hearing, the trial judge determined that defendant was eligible for the death penalty because he murdered the victim in the course of committing

another felony, *i.e.*, attempted rape. See Ill. Rev. Stat. 1983, ch. 38, par. 9-1(b)(6). At the close of the second stage of the death sentencing hearing, the circuit court sentenced defendant to death on the murder conviction and to an extended prison term of 30 years on the attempted rape conviction.

Defendant appealed directly to this court. Ill. Const. 1970, art. VI, §4(b); 134 Ill. 2d R. 603. While defendant's appeal was pending, the United States Supreme Court issued its decision in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986). On May 1, 1987, this court entered a supervisory order remanding the cause to the circuit court for a *Batson* hearing. *People v. Evans*, No. 60705, 506 N.E.2d 1314 (1987). The circuit court found that defendant had failed to establish a *prima facie* case of purposeful discrimination in the State's exercise of its peremptory challenges.

On return of the case, this court affirmed defendant's convictions and sentences. *People v. Evans*, 125 Ill. 2d 50 (1988). The United States Supreme Court denied defendant's petition for a writ of *certiorari*. *Evans v. Illinois*, 490 U.S. 1113, 104 L. Ed. 2d 1036, 109 S. Ct. 3175 (1989).

On June 27, 1990, defendant filed in the circuit court a petition for post-conviction relief nearly seven years later, defendant filed an amended post-conviction petition. On May 17, 1997, the circuit court, in the person of the same judge who sentenced defendant, granted the State's motion to dismiss the petition without an evidentiary hearing. We will discuss additional relevant facts in the context of the issues raised on appeal.

DISCUSSION

A proceeding brought under the Post-Conviction Hearing Act (Act) is not an appeal of a defendant's under-

lying judgment. Rather, it is a collateral attack on the judgment. The purpose of the proceeding is to resolve allegations that constitutional violations occurred at trial, when those allegations have not been, and could not have been, adjudicated previously. To be entitled to postconviction relief, the petitioner bears the burden of establishing a substantial deprivation of federal or state constitutional rights. Also, determinations of the reviewing court on the prior direct appeal are *res judicata* as to issues actually decided; issues that could have been presented on direct appeal, but were not, are deemed waived. *People v. Johnson,* 183 Ill. 2d 176, 186 (1998); *People v. Whitehead,* 169 Ill. 2d 355, 371 (1996); *People v. Mahaffey,* 165 Ill. 2d 445, 452 (1995).

The petitioner in a post-conviction hearing is not entitled to an evidentiary hearing as of right. Rather, the Act permits summary dismissal of a nonmeritorious petition. The allegations in the petition, supported where appropriate by the trial record or accompanying affidavits, must show a substantial violation of constitutional rights. *Johnson,* 183 Ill. 2d at 187; *Whitehead,* 169 Ill. 2d at 370-71; *Mahaffey,* 165 Ill. 2d at 452. For the purpose of determining whether to grant an evidentiary hearing, all well pleaded facts in the petition and in any accompanying affidavits, in light of the original trial record, are to be taken as true. *People v. Coleman,* 183 Ill. 2d 3 66, 3 80-82 (1998); *People v. Brisbon,* 164 Ill. 2d 236, 244-45 (1995). The circuit court's dismissal of a postconviction petition is reviewed *de novo. Coleman,* 183 Ill. 2d at 387-89.

On appeal, defendant contends that he was denied his constitutional rights at trial due to the: (1) prosecution's discriminatory use of its peremptory challenges during voir *dire* to exclude African-American venirepersons from the jury; (2) ineffective assistance of his trial counsel at the

death sentencing hearing; and (3) cumulative effect of these errors.

I. *Batson* Claim

Defendant contends that the prosecution used its peremptory challenges during *voir dire* to exclude African-American venirepersons from the jury. In *Batson,* the United States Supreme Court reaffirmed the principle that the State denies an African American defendant the equal protection of the laws when it tries the defendant before a jury from which members of the defendant's race have been purposely excluded. *Batson,* 476 U.S. at 85, 90 L. Ed. 2d at 80, 106 S. Ct. at 1716; see *Evans,* 125 Ill. 2d at 62. The ramifications of *Batson* continue to be realized. See, *e.g., Hernandez v. New York,* 500 U.S. 352, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991); *Powers v. Ohio,* 499 U.S. 400, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991).

Batson requires that a defendant first establish a *prima facie* case of discrimination. *Batson,* 476 U.S. at 93-94, 90 L. Ed. 2d at 85-86, 106 S. Ct. at 1721. Once the defendant establishes a *prima facie* case, the burden shifts to the prosecution to come forward with race-neutral and trial-specific reasons for striking the African American venirepersons. *Batson,* 476 U.S. at 97-98, 90 L. Ed. 2d at 88, 106 S. Ct. at 1723. The trial court must then consider those explanations and determine if the defendant has established purposeful discrimination. *Batson,* 476 U.S. at 98, 90 L. Ed. 2d at 88-89, 106 S. Ct. at 1724; see *People v. Williams,* 147 Ill. 2d 173, 219-20 (1991); *People v. Andrews,* 146 Ill. 2d 413, 424 (1992).

In this case, the circuit court found that defendant had failed to establish a *prima facie* case of purposeful discrimination. On direct review, this court upheld that finding. *Evans,* 125 Ill. 2d at 61-67; see *People v. Peeples,* 155

Ill. 2d 422, 469 (1993) ("a trial judge's determination that a defendant failed to establish a *Batson prima facie* case is a finding of fact and will not be overturned unless it is against the manifest weight of the evidence").

In his post-conviction petition, defendant points to one observation of this court in its discussion of this issue on direct review:

> "Perhaps even more significantly, unlike *Batson* this is not a case involving an interracial crime in which specific racial groups would be prone to take sides of prejudice. [Citation.] Here, the defendant is black, the victim was black, and the majority of witnesses are black. Any racial issue inherent in the selection of the jury is therefore minimal, if not nonexistent." *Evans*, 125 Ill. 2d at 65-66.

Defendant assigns error to this observation. The petition, supported by affidavits, alleges that the trial record fails to indicate the race of most of the witnesses and, further, that 8 of the 15 witnesses who testified at the guilt phase of the trial were white. The circuit court found that this claim was *res judicata.*

Before this court, defendant argues that, "[b]ecause [defendant's] claim was supported by new evidence, *res judicata* did not apply." The State initially responds that defendant failed to include the race of the trial witnesses in the record of the *Batson* hearing. Thus, the State contends, "because defendant's 'new evidence' is not really new, and could have been made part of the record on direct appeal, it is insufficient to overcome *res judicata.*" In his reply, defendant denies the existence of "a requirement that, to avoid *res judicata,* it is necessary that the new evidence at

issue could not have been part of the record on direct appeal."

Defendant's contention lacks merit. "It is well established that the scope of post-conviction review is limited to constitutional matters which have not been, and could not have been, previously adjudicated. " *People v. Coleman,* 168 Ill. 2d 509, 522 (1995); accord *People v.* Silagy, 116 Ill. 2d 357, 365 (1987); *People v Derengowski,* 44 Ill. 2d 476, 479 (1970). Therefore," [t]he judgment of the reviewing court on a previous appeal is *res judicata* as to all issues actually decided, and any claim that could have been presented to the reviewing court in the direct appeal is, if not presented, thereafter barred under the doctrine of waiver." Silagy, 116 Ill. 2d at 365; accord *Derengowski,* 44 Ill. 2d at 479; *Ciucci v. People,* 21 Ill. 2d 81, 85 (1960). We note that these procedural bars occasionally may be relaxed when fundamental fairness requires. *Coleman,* 168 Ill. 2d at *522; Derengowski, 44* Ill. 2d at 479; *People v. Ashley,* 34 Ill. 2d 402, 408 (1966).

We remanded this cause to the circuit court specifically for a *Batson* hearing. This was defendant's opportunity to establish a *Batson prima facie* case. At the *Batson* hearing, defendant and the prosecution stipulated to the race of the selected jurors and the peremptorily excused venirepersons. Defendant knew the race of the trial witnesses, and could have easily included those facts in the record of the *Batson* hearing. Such facts are part of the totality of relevant circumstances a trial court may consider when determining whether there was discrimination. *Evans,* 125 Ill. 2d at 63-64, citing *United States v. Mathews,* 803 F.2d 325, 332 (7th Cir. 1986), *rev'd on other grounds,* 485 U.S. 58, 99 L. Ed. 2d 54, 108 S. Ct. 883 (1988). Defendant carried the burden of preserving those facts in the record of the *Batson* hearing. See *Johnson,* 183 Ill. 2d at 190; *People*

v. Henderson, 142 Ill. 2d 258, 279-80 (1990). Defendant's failure to do so constitutes a waiver of this issue in this post-conviction proceeding. Further, no reason based on fundamental fairness suggests itself as to why the waiver rule should not apply to this claim. The circuit court properly dismissed this claim.

II. Ineffective Assistance of Counsel: Death Sentencing Hearing

Defendant next claims that he was denied his constitutional right to effective assistance of counsel at the second stage of the death sentencing hearing. U.S. Const., amends. VI, IV; Ill. Const. 1970, art. 1, §8. To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong *Strickland* test. *Strickland v. Washington,* 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). see *Brisbon,* 164 Ill. 2d at 24-46.

The test is composed of two prongs: deficiency and prejudice. First, the defendant must prove that counsel made errors so serious, and that counsel's performance was so deficient, that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. A court measures counsel's performance by an objective standard of competence under prevailing professional norms. To establish deficiency, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *People v. Griffin,* 178 Ill. 2d 65, 73-74 (1997); *Mahaffey,* 165 Ill. 2d at 457-58.

Second, the defendant must establish prejudice. The defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome. The prejudice prong of *Strickland* entails more than an "outcome-determinative" test. The defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Griffin,* 178 Ill. 2d at 74. In the context of a death sentencing hearing, a defendant must prove that there is a reasonable probability that, absent counsel's deficient conduct, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Mahaffey,* 165 Ill. 2d at 466.

A defendant must satisfy both prongs of the *Strickland* test. However, if the ineffective-assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient. *Griffin,* 178 Ill. 2d at 74; *Whitehead,* 169 Ill. 2d at 380-81. Defendant makes three contentions in support of this claim.

A. *Failure to Investigate: Extreme Mental or Emotional Disturbance*

Defendant contends that trial counsel failed to introduce available evidence to support the statutory mitigating factor that "the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance." Ill. Rev. Stat. 1983, ch. 38, par. 9-1(c)(2).

The State initially responds that the issue is waived in this post-conviction proceeding. We disagree. The trial record does not include the evidence which defendant now presents to substantiate his claim of ineffective assistance. "Rules of waiver and *res judicata* will be relaxed where the facts relating to the issue of counsel's incompetency do not appear on the face of the record." *People v. Orange,* 168 Ill.

2d 13 8, 167 (1995). Therefore, we will address the merits of this issue. See, e.g., *People v. Britz,* 174 Ill. 2d 163, 184-85 (1996); *People v. Eddmonds,* 143 Ill. 2d 501, 528 (1991).

The issue of whether defendant received effective assistance of counsel must be determined from the totality of counsel's conduct. *People v. Stewart,* 101 Ill. 2d 470, 493 (1984). At the close of the guilt phase of the trial, defendant's trial counsel sought a 30-day continuance so defendant could receive a psychiatric evaluation from Dr. Alan Rosenwald. The trial court inquired as to the purpose of the examination. Counsel responded: "Judge, it would go to the indicia-mitigation. I believe one of the factors in mitigation is that extreme, emotional distress." The trial court granted the continuance.

At the second stage of the death sentencing hearing, defendant's mitigation witnesses were himself and Dr. Rosenwald, in that order. Defendant, during direct examination, testified at length as to his troubled and disadvantaged life. He also denied committing the present crimes. During cross-examination, defendant denied having any knowledge of or involvement in the attempted rape and murder of the victim. He testified that he did not know the victim and that he was not in the elevator with her. Defendant testified that his inculpatory statement was not voluntary; he falsely confessed in exchange for a promise of a lesser charge and police protection for his family.

Dr. Rosenwald next testified. Defendant's trial counsel asked Dr. Rosenwald whether he was "able to a degree of reasonable certainty, able to determine whether or not [defendant] is acting under an extreme emotional or mental distress?" Dr. Rosenwald answered: "Well, if extreme is chronic, I have trouble with the term extreme. I think this is a long-standing mental disturbance, and that

consequently there would be periods of time where [defendant] would be acting under extreme duress. That he has been chronically ill for many years." On cross-examination, Dr. Rosenwald again concluded "that it was highly probable that [defendant] was under emotional factors which could contribute to the crimes that he committed." Also, during cross-examination, Dr. Rosenwald testified that defendant's trial counsel had not asked him to consider, thus his report did not discuss, whether defendant was acting under an extreme mental or emotional disturbance *at the time he committed the murder.*

Now, in this post-conviction proceeding, defendant contends that trial counsel was ineffective for failing to elicit testimony from Dr. Rosenwald that tracked the language of the statutory mitigating factor, *i.e.*, that defendant was acting under the influence of an extreme mental or emotional disturbance *at the time* of *the offense.* See *Evans,* 125 Ill. 2d at 89. Defendant's post-conviction petition includes affidavits from Dr. Rosenwald, Dr. Gerard Girdaukas, and Arlene Messner-Peters, attesting that defendant was under such a disturbance at the time of the murder.

This contention fails both the deficiency and prejudice prongs of the *Strickland* test. First, considering the totality of the circumstances, we cannot say that the performance of defendant's trial counsel was objectively incompetent. It is true that "[u]nder the Illinois murder statute, evidence that a defendant was *acting* under the influence of an extreme emotional disturbance at the time of the murder is one of the factors to be considered in mitigation, and may be a basis for imposing a sentence other than death." (Emphasis added.) *People v. Foster,* 168 Ill. 2d 465, 490 (1995). In this case, however, defendant testified that he *did not act, i.e.,* he was not involved in the murder in any way. "Defendant's insistence of innocence colors

the understanding of his claim." *People v. Kokoraleis,* 159 Ill. 2d 325, 330 (1994). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland,* 466 U.S. at 691, 80 L. Ed. 2d at 695, 104 S. Ct. at 2066.

It would have been difficult for defendant's trial counsel to elicit testimony from Dr. Rosenwald and, based thereon, argue that defendant *acted* under the influence of an extreme mental or emotional disturbance at the time of the murder when defendant bad just finished testifying that he *did not act* in any way. For counsel to have presented evidence of this mitigating mental state, as defendant now contends, would have been inconsistent with defendant's own testimony. See *People v. Sanchez,* 169Ill. 2d 472, 491 (1996). "Defense counsel's decision to forgo the presentation of mitigation evidence that would be inconsistent with the defendant's sworn trial testimony has been held constitutionally adequate." *People v. Holman,* 164 Ill. 2d 356, 373 (1995).

Should trial counsel have presented a defense that contradicted defendant's protestations of innocence? Should counsel have labeled their client a liar so they could additionally label him a murderer who acted under an extreme emotional disturbance? Rather, closing argument reveals that trial counsel's sentencing strategy was to portray defendant as the neglected and unwanted victim of an abusive childhood, who raped women in a misguided quest for love. "A reasoned decision to make the best of a bad situation by pursuing a particular line of defense satisfies the constitutional minimum." *Kokoraleis v. Gilmore,* 131 F.3d 692, 697 (7th Cir. 1997).

Second, this contention fails the prejudice prong of the *Strickland* test. In other words, defendant has failed to show a reasonable probability that, had trial counsel pre-

sented evidence that defendant had acted under an extreme emotional disturbance at the time of the murder, the trial judge would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. See *Mahaffey,* 165 Ill. 2d at 466.

The aggravation evidence is plentiful and significant. Initially, defendant admitted his involvement in these crimes; his inculpatory statement was admitted at trial. Many details of his statement were corroborated by other evidence.

The record contains the following additional aggravation evidence. Between 1969 and 1974, defendant committed several offenses including criminal trespass, theft, and disorderly conduct. In 1974, defendant raped Tina Yancy at knifepoint in an elevator; however, charges based on this incident were subsequently dismissed. In 1975, 20 days after his release from the county jail on the charges brought by Yancy, defendant raped Loretta Brown in an elevator. One week later, he raped Ruby Coleman in an elevator. Defendant was tried, convicted and imprisoned. In 1978, nine days after his release from prison, defendant raped Gail Carroll at knifepoint in an elevator. Again, defendant was tried, convicted, and imprisoned. In 1983, 24 days after his release from prison, defendant attempted to rape Annie Webb in an elevator. Instead, he battered her and one of her children and stole her purse, which contained a pearl-handle knife bearing the word "Lion" on the handle. The next day, defendant attempted to rape Diane Smith at knifepoint in her apartment. Smith resisted, defended herself with a kitchen knife, and forced defendant from her apartment. The day after that, defendant raped Maeline Mitchell at knifepoint in an elevator. Mitchell identified defendant's knife as the one defendant had stolen from Webb. Four days later, on January 22, 1983, defen-

dant stabbed the victim in this case to death in an attempt to rape her in an elevator.

Additional aggravation evidence included the following. While defendant was incarcerated at Menard Correctional Center, he sent letters to Paula Banks, a 16-year old sister of another inmate. In those letters, defendant asked Banks to be his girlfriend. In one letter, defendant threatened her life if she did not comply. While he was incarcerated at Graham Correctional Center, defendant was disciplined for grabbing a female correctional officer's buttocks. When defendant was released on parole, he did not cooperate with his parole officer and made no effort to find employment. A petition for violation of parole was filed as a result of the charges in this case.

First, given all of the evidence before the trial judge, there is no reasonable probability that the additional evidence now offered by defendant would have caused the trial judge to find the existence of this statutory mitigating factor. A defendant is under the influence of an extreme emotional disturbance when the defendant's emotional state at the time of the murder is at such a fragile point as to leave him or her with little to no emotional control. *Johnson,* 183 Ill. 2d at 206, quoting *People v. Phillips,* 127 Ill. 2d 499, 534 (1989). Here, the aggravation evidence, including defendant's inculpatory statement, shows that defendant's overall mental state was one of rationality and composure. Also, since defendant initially lied to police prior to giving his inculpatory statement, he apparently appreciated the criminality of his acts. See *Johnson,* 183 Ill. 2d at 206; *Foster,* 168 Ill. 2d at 491-92; *Phillips,* 127 Ill. 2d at 534-35.

Second, it must be remembered that:

> "proof of one mitigating factor, by itself, will not always preclude the imposition of the death sentence. Instead, the sentencing authority should carefully weigh the factors, aggravating and mitigating, in order to reach a fair and just result, one that is based on the particular circumstances of the offense and the defendant." *People v. Brownell, 79 Ill.* 2d 508, 538 (1980).

In light of the overwhelming aggravation evidence, we hold that even if defendant had established the existence of this statutory mitigating factor, there is no reasonable probability that the trial judge would have imposed a sentence other than death. The circuit court properly dismissed this claim.

B. *Failure to Investigate: Other Mitigation Evidence*

Defendant next contends that trial counsel failed to investigate and present evidence of other nonstatutory mitigating factors. We earlier described the aggravation evidence. Defendant's mitigation witnesses were himself and Dr. Rosenwald.

Defendant's testimony touched on many aspects of his life. Defendant gave extensive, detailed testimony regarding neglect, abuse, and sexual molestation from family, coworkers, and Strangers during his childhood and teenage years. Defendant testified regarding his married life. He described his first wife and their children, and how the family was separated due to his jail record and his first wife's neglect of their children.

He admitted committing all of the rapes with which he was charged, except for the rape of Tina Yancy. Defendant explained that he "didn't mean to rape [those] women," but that he did so due to a "need of affection." He ex-

plained: "I had to prove that "I was a man," and I just wanted somebody to love me."

Also, defendant explained that he did not grab the buttocks of the female correctional officer; rather, he accidentally touched her from behind his back. At first, the officer accepted his apology. However, she subsequently saw defendant laughing with other inmates; she believed that defendant was talking about her. At that point, she reported the touching to her supervisor, who ordered her to formally report the incident. Additionally, defendant denied writing letters to Paula Banks, but acknowledged that the name and prison identification number on the letter were his.

Dr. Rosenwald performed a psychiatric examination of defendant. Dr. Rosenwald believed that defendant felt "very impotent and empty and dependent" and "victimized." Defendant also felt anger as a result of neglect and abuse by his family. Dr. Rosenwald described defendant as "chronically a depressed human being who feels helpless, rejected, abandoned, unloved."

Dr. Rosenwald also testified that defendant: might have considerable difficulty in understanding the feelings and emotions of other people; did not have very good control of his own emotions, which would emerge in a "tumultuous" fashion; and had "a kind of psychopathology in the sexual area."

Dr. Rosenwald opined that defendant: had average intelligence; was able to conform his thinking to conventional standards "when emotional situations are not in play," was "chronically depressed"; and felt himself to be a victim of society and, therefore, "would not see himself as primarily responsible." Dr. Rosenwald opined that defendant could benefit "from some kind of psychotherapeutic

intervention," but defendant "without treatment is indeed a danger to society."

Now, in his post-conviction petition, defendant contends that trial counsel was constitutionally ineffective for failing to investigate and present evidence of defendant's: (1) social history, as described in the affidavit of Messner-Peters, and (2) mental impairments, as described in the affidavit of Dr. Girdaukas. We disagree.

The evidence of defendant's social history described in the Messner-Peters affidavit would have been cumulative to defendant's extensive mitigation testimony and, thus, of no effect on the outcome of the death sentencing hearing. See *Sanchez,* 169 Ill. 2d at 490-91; cf. *People v. Towns,* 182 Ill. 2d 491, 521 (1998) (proffered mitigation evidence not cumulative where mitigation evidence presented at death sentencing hearing "devoid of detail regarding defendant's life"). Further, such evidence is not inherently mitigating. *Stewart v. Gramley,* 74 F.3d 132, 136 (7th Cir. 1996). The trial judge might have considered such evidence to be an aggravating factor. The judge could have regarded defendant's troubled life, with his criminal record, as an indicator of defendant's future dangerousness. See *Mahaffey,* 165 Ill. 2d at 467; *People v. Ward,* 154 Ill. 2d 272, 335-37 (1992).

Similarly, evidence of mental impairments as described in Dr. Girdaukas' affidavit is not inherently mitigating. *Holman v. Gilmore,* 126 F.3d 876, 882-84 (1997). Proof of defendant's mental handicaps not only could evoke compassion from the trial judge, but also could have demonstrated defendant's continued dangerousness. See *Fosler,* 168 Ill. 2d at 490-91; *Mahaffey,* 165 Ill. 2d at 467-68.

"Moreover, we must assess prejudice in a realistic manner based on the totality of the evidence. Accordingly,

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it is improper to focus solely on the potential mitigating evidence. As our cases illustrate, the nature and extent of the evidence in aggravation must also be considered." *Coleman*, 168 Ill. 2d at 538 (collecting cases). In this case, the aggravation evidence was overwhelming. We conclude that the introduction of the evidence now proffered by defendant regarding his background and mental health would not have created a reasonable probability of a different sentence. See *Coleman*, 168 Ill. 2d at 539; *People v. Thomas*, 164 Ill. 2d 410, 424-29 (1995). The circuit court properly dismissed this claim.

C. *Failure to Object: Victim's Pregnancy*

Defendant next contends that trial counsel failed to object to aggravation evidence and argument that the victim was pregnant. Edmund Donaghue, deputy chief medical examiner of Cook County, testified that the victim was five months' pregnant at the time she was killed. Defendant notes Dr, Donaghue's testimony that the victim's pregnancy was not externally visible; thus, defendant was unaware that she was pregnant. During closing argument, both the prosecution and defendant's trial counsel referred to this evidence. Defendant's trial counsel failed to object to this evidence and argument.

Defendant argues that such evidence and argument were irrelevant, inflammatory, and highly prejudicial. Dismissing this claim, the circuit court found that defendant's trial counsel was not deficient and defendant was not prejudiced.

This issue is barred by operation of *res judicata* and waiver. A petitioner cannot obtain relief under the Act by rephrasing issues, which were previously addressed, in constitutional terms, such as ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 277-78 (1992) (and

cases cited therein). This court found that defendant was not prejudiced by this evidence and argument. *Evans*, 125 Ill. 2d at 94-96. Defendant cannot now argue that trial counsel was ineffective for failing to object to what this court has previously concluded to be nonprejudicial. See *Thomas*, 164 Ill. 2d. at 420-21. The circuit court properly dismissed this claim.

III. Cumulative Effect of Alleged Errors

Defendant lastly claims that the cumulative effect of these alleged errors violated his constitutional rights. The circuit court properly dismissed this claim. We have rejected each claim in this post-conviction petition. Thus, there can be no cumulative effect. See *People v. Franklin*, 135 Ill. 2d 78, 105 (1990); *People v. Albanese*, 102 Ill. 2d 54, 82-83 (1984).

CONCLUSION

For the foregoing reasons, the order of the circuit court of Cook County is affirmed. The clerk of this court is directed to enter an order setting Tuesday, May 18, 1999, as the date on which the sentence of death entered in the circuit court is to be imposed. The defendant shall be executed in the manner provided by law. 725 ILCS 5/119-5 (West 1996). The clerk of this court shall send a certified copy of the mandate in this case to the Director of Corrections, the warden of Tamms Correctional Center, and the warden of the institution where defendant is now confined.

Affirmed.

JUSTICES HEIPLE and RATHJE took no part in the consideration or decision of this case.

JUSTICE HARRISON, concurring in part and dissenting in part:

I agree that no basis exists for disturbing Evans' convictions or the sentence he received for the attempted rape of Adrian Allen. In my view, however, Evans' death sentence should not be allowed to stand. For the reasons set forth in my dissent in *People v. Bull,* 185 Ill. 2d 179 (1998), this state's present death penalty law does not meet the requirements of the eighth and fourteenth amendments to the United States Constitution (U.S. Const., amends. VIII, XIV) or article I, section 2, of the Illinois Constitution (Ill. Const. 1970, art. 1, §2). Accordingly, we should vacate Evans' death sentence and remand the cause to the Circuit court for imposition of a sentence other than death.

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS, COUNTY DEPARTMENT,
CRIMINAL DIVISION

JOHNNIE LEE EVANS,	)	
Petitioner,	)	
	)	
vs.	)	83-CR-1164
	)	
PEOPLE OF THE STATE	)	
OF ILLINOIS	)	
Respondent,	)	

ORDER

Discussion

Petitioner, Johnnie Lee Evans, pursuant to the provisions of the Illinois Post Conviction Hearing Act, 725 ILCS 5/122-1 et seq. (West 1996), seeks to vacate the judgment of conviction entered against him. On May 2, 1984 petitioner was found guilty by a jury of murder and attempted rape. On June 11, 1984 petitioner was sentenced to death by lethal injection for the murder conviction. On July 13, 1984 the petitioner was sentenced to the Illinois Department of Corrections for a term of 30 years for the attempted rape conviction.

Petitioner, by right, filed an appeal directly to the Illinois Supreme Court. On September 29, 1988 the Court affirmed the sentence in People v. Evans, 125 Ill.2d 50, 125 Ill.Dec. 790, 530 N.E.2d 1360 (1988). This court presided over defendant's trial and is fully aware of the facts of the case. Those facts will not be reiterated here.

Analysis

The Post-Conviction Hearing Act provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial. People v. Brisbon, 164 Ill.2d 236, 242, 647 N.E.2d 935 (1995). A post-conviction proceeding is not an appeal of the underlying conviction; rather, it is a collateral attack on the trial court proceedings in which a defendant attempts to establish constitutional violations that have not been and could not have been previously adjudicated. People v. Thompkins, 161 Ill.2d 148, 157, 641 N.E.2d. 371 (1994).

Because a post-conviction proceeding brought under the Act is a collateral attack on a judgment of conviction, all issues actually decided on direct appeal are *res judicata,* and all issues which could have been raised, but were not, are waived. People v. Whitehead, 169 Ill.2d 355, 371, 662 N.E.2d 1304, 1312 (1996).

In addition, a post-conviction petition does not entitle a defendant to an evidentiary hearing as a matter of right. People v. Titone, 151 Ill.2d 19, 24, 600 N.E.2d, 1160 (1992). Rather, a petitioner is entitled to an evidentiary hearing only if the petitioner makes a substantial showing, based on the record and supporting affidavits, that his constitutional rights were violated. People v. Guest, 166 Ill.2d 381, 389, 655 N.E.2d 873, 877 (1995).

I. Batson Issue

Petitioner first claims that the prosecution systematically and purposefully excluded black members of the venire. Evans raised this very issue on direct appeal to the Illinois Supreme Court. People v. Evans, 125 Ill.2d 50, 125 Ill.2d 790, 530 N.E.2d 1360 (1988). The Court upheld the trial courts holding that the defendant failed to establish a *prima facie* case of discrimination. Id. The petitioner has

presented this argument on direct appeal and is therefore barred by the doctrine of *res judicata.* Evans claims that *res judicata* does not apply because the Illinois Supreme Court improperly considered evidence outside the record. In particular, Evans argues that the Court mistakenly held that a "majority of witnesses were black". In support of this argument, Evans attaches affidavits from the state's witnesses that 8 of the 13 state's witnesses were white. However, Evans fails to address that the trial court held that the defendant failed to establish a prima face case of purposeful discrimination. The Supreme Court noted that 14.5% of the venire were black and 16.66% of the jury empanelled was black. In addition, the Court stated:

> [t]he 4 excluded jurors whom defendant has not waived his claim for Batson violation share two significant characteristics apart from their race. They are male and are engaged in nonprofessional occupations or are unemployed. Consequently, it cannot be said that race is the only characteristics shared amongst the excluded black jurors.

Petitioner's claim fails to address these facts presented by the Court. Rather, Evans relies on one word of the Court's decision and focuses an entire argument on the word "majority". Therefore, Evans claim of purposeful discrimination by the prosecution is *res judicata.*

II. Ineffective Assistance of Counsel

Evans remaining counts assert that failures by trial counsel has rendered trial counsel's assistance ineffective. The standard for determining effective assistance of counsel has been set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This two-part test of effective assistance of counsel was adopted by the

Illinois Supreme Court in People v. Albanese, 104 Ill.2d, 504, 85 Ill.Dec. 441, 473 N.E.2d 1246 (1984). Under the test, a defendant must establish that (1) counsel's representation fell below an objective standard of reasonableness and that (2) there is a reasonable probability that, were it not for the counsel's unprofessional errors, the result of the proceeding would have been different. Albanese, 104 Ill.2d at 525. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Evans asserts that he was denied the effective assistance of counsel during the penalty phase of the death penalty hearing by defense counsel's (1) failure to object to the introduction of irrelevant victim impact evidence and argument based on that evidence, (2) failure to present evidence of extreme distress or emotional disturbance, (3) failure to present mitigation evidence, and (4) cumulative errors.

A. Victim Impact Evidence

At trial, the State called as a witness Dr. Edmund Donoghue, the deputy chief medical examiner for Cook County, Illinois, who performed the autopsy on the victim Adrian Allen. Dr. Donoghue testified that at the time of her death, Adrian Allen was approximately five months pregnant with a female fetus and that Allen's pregnancy was not externally visible. Trial counsel did not object to this testimony. During closing arguments, the state argued the pregnancy of the victim and trial counsel did not object.

Evans argues that the introduction of the pregnancy of Adrian Allen is irrelevant and the failure of trial counsel to object to the testimony renders counsel ineffective. As stated above, under the first prong of the two part test established in Strickland, the petitioner must show that his counsel made errors so serious, and his performance was so

deficient, that he was not functioning as "counsel' guaranteed by the sixth amendment. Strickland, supra.

Evans has failed to prove that counsel actions were deficient. As a general rule, trial strategy encompasses decisions such as what matters to object to and when to object. People v. Picoraro, 144 Ill.2d 1, 161 Ill.Dec. 296, 578 N.E.942 (1991). Furthermore, counsel's failure to bring a motion, to object to testimony, or to object to portions of closing arguments does not establish incompetent representation. Id. Therefore, because trial, counsel assistance was not deficient, petitioner claim must fail.

Even if trial counsel had been deficient, Evans has failed to prove that there is a reasonable probability that Evans would not have received the death penalty. Strickland, supra. In the context of a death sentencing hearing, the defendant must prove that counsel's representation was deficient and that there is a reasonable probability that, but for counsel's deficient conduct, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. People v. Hampton, 149 Ill.2d 71, 171 Ill.Dec. 439, 594 N.E.2d 291 (1992).

Evans asserts that if the trial court had not been aware of the pregnancy of Adrian Allen that there is a reasonable probability that Evans would not have been sentenced to the death penalty. Beside making the claim Evans fails to cite any support for this assertion. In a death penalty sentencing hearing before a trial judge, not a jury, there exists a presumption that the judge considered only competent and relevant evidence. People v. Shum, Ill.2d 317, 11 Ill.Dec. 546, 512 N.E.2d 1183 (1987). Evans has failed to support that there is a reasonable probability that the judge considered the alleged improper evidence. In addition, Evans has failed to support his assertion that the trial

court would not have sentenced Evans to death. Therefore, this claim must fail.

B. Extreme Mental or Emotional Disturbance

Evans next claim is that trial counsel provided ineffective assistance through the failure to present evidence that Evans was acting under extreme mental or emotional distress at the time of the offense. At trial, defense counsel called Dr. Rosenwald in mitigation. Dr. Rosenwald testified that he had examined Evans and determined that Evans suffers from "a kind of psychopathology in the sexual area." (R.2992). Next, when asked if Mr. Evans acted under extreme or emotional distress, Dr. Rosenwald testified, "Well, if extreme is chronic, I have trouble with the term extreme. I think this is a longstanding mental disturbance, and that consequently there would be periods of time where he would be acting under extreme duress." Evans, 125 Ill.2d at 86.

As the Illinois Supreme Court noted, " nowhere in his testimony does Dr. Rosenwald specifically state that defendant operated under extreme mental or emotional disturbance at the timer he committed the offense. At most, he testified that defendant was under emotional factors which could contribute to the crime". (Emphasis added). Id. at 87.

When raising an ineffective assistance claim, the petitioner must satisfy the requirements of Strickland. Supra. Evans has failed to show that trial counsel was deficient. Dr. Rosenwald examined Evans at the request of defense counsel and Dr. Rosenwald was unable to conclude that Evans was under extreme distress or emotional disturbance. Evans cannot now argue that trial counsel was ineffective for the conclusion that Dr. Rosenwald testified to during the sentencing hearing.

In support of his ineffective counsel claim, Evans presents the affidavits of Alan K. Rosenwald Ph.D., Dr. Gerald J. Girdaukas and Arlene Messner-Peters, L.C.S.W. to support that Evans was under extreme mental or emotional disturbance

In his three paragraph affidavit, Dr. Rosenwald states that he was "unable to couch my opinion in the language referred to because I did not have a definition of the term extreme and it is not a term generally used in my field of expertise." However, Dr. Rosenwald is still unable to render an opinion that emotional disturbance.

The only assertion that Evans makes is that if the two other experts, Gerald J. Girdaukas, Ph.D. and Arlene Messner-Peters, M.S.W., L.C.S.W., were called to testify that they would have stated that Evans was under extreme mental or emotional disturbance. Clearly, counsel made an attempt to seek testimony from Dr. Rosenwald concerning extreme distress or emotional disturbance. To now argue that trial counsel did not call these three particular experts does not render defense counsel deficient.

Evans has failed to satisfy to establish that trial counsel was deficient concerning the presentation of extreme mental of emotional disturbance evidence. Therefore, this claim must fail.

C. Other Mitigation Evidence

Next, Evans argues that Evans was denied the effective assistance counsel during the penalty phase of the sentencing hearing by defense counsel's failure to present other mitigation evidence. The Illinois Supreme Court has repeatedly held that defense counsel's failure to introduce mitigation evidence at a death penalty hearing does not necessarily constitute ineffective assistance of counsel. People v. Emerson, 122 Ill. 2d 411, 439, 119 Ill. Dec. 250,

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522 N.E.2d 1109 (1987). The rationale for these holdings is that mitigating factors can be found in any evidence produced at trial or at sentencing, even when the defense presents no evidence of its own. People v. Johnson, 114 Ill.2d 170, 207, 102 Ill.Dec. 342, 499 N.E.2d 1355 (1986).

Evans has failed to show that trial counsel was deficient in the presentation of mitigation evidence. Evans testified on his own behalf as to his own social background. Evans testified to his childhood, upbringing, lack of education, attempts to find employment, among other testimony. (R.2816-2965). The trial judge was able to obtain mitigation evidence, if any, from the defendant himself. Evans argues that trial counsel should have called certain witness to testify to the social background of the defendant. Clearly, the social background of Evans conducted by other sources would render the same information.

In addition, defense counsel called Dr. Rosenwald to testify to defendant's mental status. Dr. Rosenwald was unable to provide sufficient testimony to support the theory of extreme distress or emotional disturbance. Trial counsel's conduct was reasonable in the attempt to establish extreme mental or emotional disturbance and therefore not deficient.

Even if trial counsel was deficient, Evans has failed to prove prejudice. Evans fails to show there is a reasonable probability that the defendant would not have been sentenced to death. Hampton, supra. Therefore, the claim of ineffective trial counsel for the failure to present mitigation evidence must fail.

D. Cumulative Effect

Lastly, Evans argues that the cumulative effects of the errors on the issues of guilt and penalty denied Evans his constitutional rights at trial and at the death penalty

hearing in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights and his rights under the Illinois Constitution. As set forth in this order, trial counsel has not been held as ineffective on any of the three counts raised by Evans. Therefore, this claim must fail.

Conclusion

Based on the petition and record, the court dismisses Evans post-conviction petition for the failure to raise any substantial violation of the constitution. In addition, this court hereby denies the petitioner's request for (1) sufficient funds to secure investigative and expert assistance, (2) additional time to investigate and present additional facts, (3) discovery, (4) an evidentiary hearing, and (5) vacating the judgments and sentences imposed.

Entered by: /s/ Joseph J. Urso
Joseph J. Urso
Circuit Court of Cook County
Criminal Division

Dated: 5-14-97

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING

SPRINGFIELD 62701

March 29, 1999

No. 83457 - People State of Illinois, appellee, v. Johnnie Lee Evans, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 8, 1999.

Heiple and Rathje, JJ., took no part.

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS, COUNTY DEPARTMENT,
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
Respondent,	)	
v.	)	No. 83 C 1164
JOHNNIE LEE EVANS,	)	
Petitioner.	)	

AFFIDAVIT OF ARLENE MESSNER-PETERS

I, Arlene Messner-Peters, first being duly sworn, on oath depose and state as follows:

EDUCATIONAL AND PROFESSIONAL BACKGROUND

1. I am a licensed social worker and a licensed clinical social worker in the State of Illinois. I earned a Bachelor of Arts in Human Services, with a specialization in Human Development, from National Lewis University in Evanston, Illinois in 1984. In 1988, I earned a Master's degree in Social Work, with a specialization in Adolescent and Family Dynamics, from the Jane Addams School of Social Work at the University of Illinois in Chicago.

2. I am employed as a clinical social worker by Counseling Connection, located at 49-51 Sherwood Terrace, Suite 49P, Lake Bluff, Illinois, which provides psychiatric, psychological and social services to individuals

and families. I provide individual, family, couple and group therapy. I administer a six-week parenting training program. I also administer a sixteen-week domestic batterers program. In my work, I employ cognitive, structural and strategic therapeutic approaches.

3. From January 1989 to January 1991, I served as a Juvenile Intensive Probation Officer for the Nineteenth Judicial Circuit in Lake County, Illinois. In this position, I assisted in developing the Juvenile Intensive Probation Program, which involved the supervision of high risk, highly resistive delinquent youth on probation. This supervision included on-site therapy with youth and family, crisis intervention and networking with community/residential agencies.

4. From 1984 until 1988, I was employed as a Probation Officer by the Nineteenth Judicial Circuit in Lake County. My responsibilities included the supervision of youths placed on probation as well as assisting them and their families in complying with court orders and networking with support agencies. During my internship for my license in social work, I conducted family assessments as well as family and individual therapy with delinquent youth and their families. I was also a co-therapist in a parent training course.

5. I am a member in good standing of the National Association of Social Workers. A copy of my resume is attached as Exhibit 1.

REASON FOR REFERRAL

6. I was retained by attorneys for Johnnie Lee Evans, a forty-five year old African-American male, to investigate and evaluate his social history and background, with particular attention to his family, educational and medical history. The purposes of this evaluation are to determine

whether Mr. Evans was physically, psychologically and sexually abused as a child and as an adolescent; determine whether Mr. Evans' development and functioning during his childhood, adolescence and adulthood was affected by physical, psychological and sexual abuse; and determine whether the absence of support and intervention by social service agencies and other institutions contributed to Mr. Evans' social, emotional and psychological functioning.

7. To obtain information regarding Mr. Evans' social history, I interviewed the following people:

a. Johnnie Lee Evans

b. Esther Porter, Mr. Evans' sister

c. Beverly Moore, Mr. Evans' sister

d. Betty Pruitt, Mr. Evans' common law wife

e. Florence Clinton, Betty Pruitt's sister

I also reviewed written summaries of interviews of the following people:

a. Jacklyn Edwards, Mr. Evans' cousin

b. Bessie Crockman, Mr. Evans' cousin

c. Grace Rogers, Mr. Evans' former school teacher

In addition, I reviewed the following documents:

a. Certificate of Birth for Johnnie Lee Evans, date of birth February 23, 1951

b. Medical records from Princeton Hospital for John Kelly, dated June 24, 1959, August 19, 1959 and September 14, 1962

c. Chicago Public Schools Boy's Registration Cards for Johnnie Lee Evans

d. Medical records from Illinois Eye and Ear Infirmary, dated September 12, 1966 through July 9, 1971

e. Records from Methodist Youth Services, dated December 15, 1969 through March 18, 1971

f. Medical records from Robert J. Brown Ocularists, Ltd. (formerly Mager & Gougelman), dated August 8, 1979 through November 29, 1979

g. Records from Department of Children and Family Services relating to Jonnie Lee Clanton and Quller Love Evans, dated June 1974 through June 1989

h. Employment records from the First National Bank of Chicago

i. Psychiatric Institute Records relating to Johnnie Lee Evans, dated October 20 and 21, 1983, March 18, 1983, February 3, 9 and 10, 1983, May 16 and 19, 1975, and May 19, 1969

j. Records from the Illinois Department of Corrections, dated from November 18, 1978

k. Parole Board records, dated from January 2, 1978

l. Police reports/notes re: Adrian Allen homicide, dated January 22, 1983

m. Statements given by Johnnie Lee Evans, dated January 24, 1983

n. Pre-Sentence Investigation, dated May 30, 1984

o. Transcripts from death penalty sentencing hearing, dated June 8, 1984

p. Affidavit of Dr. Gerard J. Girdaukas, dated November 4, 1996

This is the kind of information routinely relied upon by social work professionals to reach their clinical opinions.

EARLY CHILDHOOD

8. Mr. Evans' infancy and early childhood were marked by abandonment, physical and emotional neglect, physical and sexual abuse, and frequent exposure to inappropriate sexual behavior condoned and participated in by his caretakers and other adults in his environment. This pattern continued into his early adolescence. This pattern of abandonment and abuse had devastating consequences for Mr. Evans' social and emotional development.

9. Mr. Evans was born on February 23, 1951 in Sussex County, Delaware. He was delivered by a midwife in a barn or a chicken coop. Mr. Evans was the fourth of eight children born to Ethel Mae Evans. She was 21 years old when Mr. Evans was born. No father is listed on his birth certificate. Mr. Evans never knew his biological father. Mr. Evans was told that he was conceived when his father raped his mother. Mr. Evans' known siblings are:

a. Mack Evans

b. Fanny Pearl Evans Jackson

c. Queen Esther Porter

d. Beverly Jennings Moore

e. James (last name unknown)

f. Jeanette Richardson

g. Ronald Richardson

10. Mr. Evans did not know his mother when he was a child. From birth, Mr. Evans was unwanted and was passed from relative to relative. Shortly after his birth, Mr. Evans' mother gave him to his maternal grandfather, Randolph Evans. Randolph Evans took the baby to Hightstown, New Jersey, where Mr. Evans' great-grandmother, Essie Mae Evans, and other family members lived. Essie Mae Evans cared for Mr. Evans as a baby for only one year before deciding to give the baby away and leave the area. She gave the baby to her daughter (Mr. Evans' great-aunt), Annie Kelly.

11. As a child, Mr. Evans believed that Annie Kelly was his mother. His name was John Kelly, and he called Annie Kelly "Ma." Ms. Kelly was a migrant farm worker who followed the seasonal work up and down the East Coast picking fruits and vegetables. They traveled through New Jersey, Massachusetts, West Virginia, Georgia, Florida, and other states. Mr. Evans worked in the fields with Ms. Kelly. They did not stay in any place for very long. They traveled from farm to farm in the backs of pick-up trucks with other migrant workers. They lived in one room shacks, often with no electricity, running water or toilet facilities. Sleeping arrangements were also inadequate. Mr. Evans shared a bed with Ms. Kelly. He recalls that she slept only in her bra and panties. This is Mr. Evans' earliest recollection of the inappropriate sexual

behavior and conduct to which he was exposed throughout his childhood and adolescence.

12. Annie Kelly was a violent and aggressive person. Mr. Evans recalls that she once cut a man with a machete after he called her a name. On another occasion, while the two were living in a one-room shack on a potato plantation, Ms. Kelly threw a pot of hot lye on a man. Mr. Evans heard the man screaming for two days.

13. Ms. Kelly was also violent towards Mr. Evans. She frequently physically abused him. She forced Mr. Evans to stand with his head between her legs while she beat his back, buttocks and legs with tree limbs. The beatings lasted until the tree limb broke or Ms. Kelly tired. Mr. Evans remembers an occasion in which he was involved in a fight with another boy and came home crying. Instead of comforting him, Ms. Kelly beat Mr. Evans because he was crying.

14. At the end of the harvest season, Ms. Kelly and Mr. Evans occasionally lived with her daughter, Bessie Crockman, and her daughter's family in Hightstown, New Jersey. Living in the Crockman household were Bessie; her husband, James; her daughter, Jacklyn Edwards; and Jacklyn's five children. After another maternal great-aunt, Pearl Crockman, became ill, she too moved into Bessie's house, along with Mr. Evans' older sister, Queen Esther, whom Pearl had been raising. Mr. Evans believed that Queen Esther was his cousin; only later did he learn that she was his sister.

15. Life in the Crockman household was crowded and chaotic. Once again, Mr. Evans was exposed to frequent inappropriate sexual behavior by and among family members. Inappropriate sexual contact took place between the children on a regular basis. Queen Esther made sexu-

ally explicit overtures to Mr. Evans. The adults in the household, who apparently knew about the children's behavior, did nothing to stop it.

16. Bessie's husband, James, was a minister who worked as a landscaper. He did not interact with any of the children in the household, and he kept mostly to himself. Mr. Evans recalls that Bessie was in charge of the household and that she dominated James.

17. Mr. Evans was also subjected to physical and emotional neglect while living with the Crockmans. Food was scarce in the household, and Mr. Evans was told that he ate too much and was too much of a burden. Clothing was not purchased for him on a regular basis. Mr. Evans was frequently reminded that he belonged to no one. He was treated differently and worse than the other children. When the other children received gifts or toys, he received none. When he played with the others' toys, he was punished. He remembers being very jealous of the other children when they received gifts and toys.

18. Mr. Evans spent most of his free time with Jacklyn's oldest child, Winnie. Winnie later died of leukemia.

19. On two occasions, Annie Kelly took Mr. Evans to live with her in Jacksonville, Florida, along with her son and her son's family. During one of these trips, in 1963, Mr. Evans telephoned Bessie in New Jersey and asked if he could come back to live with her. He wanted to leave Florida because he had been disciplined at school by being beaten in the head with a rubber hose. Ms. Kelly put him on a train and sent him alone back to New Jersey. He never saw Annie Kelly again.

20. James, Bessie's husband, passed away in 1965, when Mr. Evans was fourteen years old. Mr. Evans

overheard Bessie telling Jacklyn, her daughter, that she could not or did not want to care for Mr. Evans any longer and that she was thinking of sending him to live with his mother in Chicago. Mr. Evans was devastated at hearing this because he had believed that Annie Kelly was his mother.

MEDICAL HISTORY

21. From infancy, Mr. Evans had had a cataract in his left eye. In June of 1959, when he was eight years old, Annie Kelly took him to Princeton Hospital in Princeton, New Jersey. According to medical records, Ms. Kelly told the doctors that Mr. Evans had never complained about his eye. Mr. Evans was diagnosed as having a congenital cataract of the left eye.

22. Two months later, in August 1959, Mr. Evans returned to Princeton Hospital. Ms. Kelly reported that Mr. Evans had diminishing vision in his left eye and had difficulty distinguishing light with the eye. The doctor diagnosed a hypermature cataract of the left eye. Ms. Kelly consented to a surgical operation on Mr. Evans by signing an "X." Mr. Evans spent six days in the hospital; no one visited him while he was there.

23. In April 1962, when Mr. Evans was eleven years old, Bessie Crockman took him to Princeton Hospital, again for problems with his eye. Medical records reflect that he had been experiencing redness, blindness and tearing of his left eye for two weeks. The doctor noted that the anterior chamber of the eye was filled with blood. He diagnosed a hyphema of the left eye and recommended observation.

24. Several months later, in September 1962, Mr. Evans returned to Princeton Hospital. The medical records indicate that he had been struck in left eye the previ-

ous day and began experiencing pain. His left eye was removed and replaced with a glass ball. Mr. Evans remembers his hospital stay as very frightening because he was all alone.

ADOLESCENCE IN CHICAGO

25. At age fourteen, Mr. Evans was placed on a train all alone by the Crockmans and sent from New Jersey to Chicago. His maternal uncle, Nathaniel Evans, and Queen Esther, whom he now realized was his sister and not his cousin, met him. They took Mr. Evans to a three-bedroom apartment in a public housing project on the south side of Chicago. Ten other people were already living in the apartment: Mr. Evans' mother, Ethel Mae Evans Richardson; four of her children, Fanny or Pearl, Queen Esther, Jeanette and Ron; her sister, Asadean Evans; and Asadean Evans' four children, Pamela, Claressa, Lorenzo and Butch. The household was supported only by public aid.

26. Mr. Evans' mother openly displayed her dislike for him. She disciplined him by beating him and by throwing him out of the apartment, often for days at a time. He lived in the building's elevators during this time.

27. Incest and inappropriate sexual behavior were common in this household as well. Ms. Richardson often wore only a bra and slip while in the apartment and slept in the same bed with the children. Shouting and fighting frequently occurred in the household.

28. Around age fifteen, Mr. Evans began to abuse alcohol as a way to escape from his environment and from himself. He drank vodka or whatever he could get on a daily basis. He drank to intoxication every day.

29. When he was sixteen years old, Mr. Evans forced his sister Beverly to have oral sex with him in an elevator after he stopped the elevator between floors. After Beverly reported this incident to their mother, Ms. Richardson beat John with an electrical cord and called the police. He spent one night in a juvenile detention center and was released the following day to his uncle. His mother, who wanted Mr. Evans out of the household, registered him for the Job Corps. He waited at home, with the incestual relationship between Mr. Evans and Beverly continuing, until he left for the Job Corps.

30. From July 1967 until August 1968, John was enrolled in the Job Corps program at Lydick Lake Job Corps Training Center in Chippewa, Minnesota. The director of the facility recalls John as a typical corpsman. Mr. Evans remained at the center until it closed, at which time he returned briefly to his mother's apartment.

31. Mr. Evans reentered the Job Corps at Atterbury Job Corps Center in Edinburgh, Indiana later in 1968. He was terminated from the program after he defended himself from a homosexual attack by attacking the man with a knife.

EDUCATIONAL HISTORY

32. When Mr. Evans was approximately six years old, Bessie Crockman suggested to Annie Kelly that Mr. Evans should be enrolled in school rather than working in the fields. Bessie agreed to let Mr. Evans live in her house. She enrolled him in the Walter C. Black Elementary School.

33. Mr. Evans had adjustment problems at school. He frequently acted out. At times he upset other students by removing his glass eye.

34. After Mr. Evans was sent to Chicago, in September 1966, he was enrolled as an eighth grader in Abbott School. Six weeks later, he transferred to Drake Vocational School. Mr. Evans' score on intelligence tests administered in 1966 was 86. This score is one standard deviation below the average intellectual level of 100, indicating that Mr. Evans was functioning below the average level of intellectual skills. Achievement tests administered in November 1966 indicated that Mr. Evans read at a fourth grade level. His math and spelling skills were rated at a sixth grade level. He received a "fair" mark for scholarship and a "fair or acceptable progress" for conduct. Mr. Evans dropped out of school after eighth grade.

35. Mr. Evans earned his GED in 1967 while he was in the Job Corps.

ADULT YEARS

36. After leaving the Job Corps program, Mr. Evans moved in with his sister, Queen Esther, after his mother told him that he could no longer live with her. In December 1969, Mr. Evans was referred to Methodist Youth Services. Through Methodist Youth Services, he was placed at the Sears YMCA in early 1970.

37. One week after entering the program, Mr. Evans went to work at a bakery on West Lexington Street, in Chicago. He worked two days before quitting because it was too cold to work in the section where he was placed and his manager had a hateful attitude. Mr. Evans' counselor at the YMCA agreed that the manager's attitude was inappropriate.

38. In March 1970, Mr. Evans was evaluated by a psychologist, Dr. Diesenhaus. Dr. Diesenhaus reported to Mr. Evans' counselor that Mr. Evans would never succeed in holding employment until his emotional and psychologi-

cal problems stemming from his upbringing and the loss of his eye were addressed. The counselor concluded that "more attention should be paid towards John's feelings and less toward forced motivation for work, being careful not to set the stage for countless frustrations for both parties." Mr. Evans never received this assistance.

39. The following day, Mr. Evans was accused of stealing clothes from another resident of the YMCA. Although Mr. Evans was initially told that he would have to leave the program, his counselor interceded and secured Mr. Evans' transfer to another program. In March 1970, Mr. Evans moved into the Isham YMCA. His new counselor soon observed that Mr. Evans seemed "highly motivated and persistent in following his goals." After moving into Isham YMCA, Mr. Evans began working at the Fantasy Car Wash at 5910 S. Pulaski in Chicago. Both Mr. Evans and his counselor viewed this as an interim job. Mr. Evans sought better employment. He was eventually hired by the First National Bank of Chicago, where he worked as a messenger and was trained as a computer operator. Mr. Evans lost this job due to absenteeism.

40. Mr. Evans' counselor at Methodist Youth Services recognized that Mr. Evans' blindness is his left eye hindered his ability to find a job. In December 1970, the counselor wrote, "Most of what prevents Johnnie from finding a job is the multiplicity of his problems. He is somewhat short, considered underweight, single, doesn't have a sound or consistent work record, slightly less than two years high school and black. From time to time possibilities have come his way but for one of the above reasons has not been hired. One job would not hire him because he was a half inch too short. Another deterrent is his having only one eye." The counselor also noted Mr. Evans' low self-esteem.

41. In August 1970, the counselor took Mr. Evans to the University of Illinois College of Medicine in Chicago to see if anything could be done to improve Mr. Evans' sight. They were told that nothing could be done. This news caused Mr. Evans to fall into depression.

42. Around December 1970, the counselor told Mr. Evans that it was time for him to leave the YMCA program. Mr. Evans made a series of phone calls, trying to find someone who would take him in. Eventually, the counselor realized that Mr. Evans had no place to go. Mr. Evans pleaded to be allowed to stay.

43. In February 1971, Mr. Evans spent a few days with his sister Fanny. However, Fanny objected to him using her phone and eating her food, and she made Mr. Evans leave. Mr. Evans' mother would not consider having him live with her. Mr. Evans was terminated from the Methodist Youth Services Program on March 11, 1971.

44. Mr. Evans lived with his sister, Queen Esther, for a short period of time and then decided to return to Hightstown, New Jersey. However, when he arrived, the family did not want him there. They raised the money to send him back to Chicago.

MARRIAGE

45. Upon his return to Chicago, Mr. Evans moved in with Betty Ann Clanton Pruitt, whom he had met in December 1969. Ms. Pruitt had a history of mental illness and had been hospitalized for mental illness. After she left the hospital, she lived with her mother for a brief period of time before moving in with Mr. Evans. She became pregnant, and Mr. Evans' son, Jonnie Lee,[1] was born on No-

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[1] The children's names are spelled as they appear on their birth certificates.

vember 22, 1971. Ms. Pruitt gave birth to a second son, Quller Love Evans, on December 6, 1973.

46. Mr. Evans and Ms. Pruitt abused drugs and alcohol throughout their relationship. Mr. Evans used marijuana daily, and reports that he was intoxicated throughout the day.

47. In March, 1974, Mr. Evans was arrested for the rape of Tina Yancy. He was unable to post bail. While he was in jail, his son Jonnie was admitted to the hospital with serious injuries inflicted by Ms. Pruitt. Ms. Pruitt was arrested for child abuse or neglect. Quller was placed in Fanny's house. After Ms. Pruitt was hospitalized in the Chicago Read Mental Health Center, both children were placed in foster homes.

48. Following his arrest and the loss of his children, Mr. Evans' life deteriorated to an even greater degree. He stopped seeking employment. His abuse of drugs and alcohol worsened. He drifted from relative to relative and was frequently hungry. Mr. Evans reported that on the day of the offenses he was intoxicated, had smoked marijuana and was hungry.

CONCLUSIONS

49. Mr. Evans's infancy and childhood were marked by abandonment and inattention to his emotional and physical needs. Throughout his childhood, Mr. Evans was denied the opportunity to bond with any of his caretakers. He suffered physical, sexual and emotional abuse from the adults in whose care he was left. Mr. Evans did not receive the nurturance necessary for normal emotional and social development. As a result and through no fault of his own, Mr. Evans' emotional and social development was abnormal. The lack of nurturance suffered by Mr. Evans

has life-long effects, including increased frustration and the inability to control aggressive behaviors.

50. The chronic physical, sexual and emotional abuse Mr. Evans suffered also had life-long effects on his emotional and social development, including the association of love with violence and the inability to function under stress without aggression. As a result of the chronic sexually abusive and inappropriate behavior to which Mr. Evans was exposed from childhood on, Mr. Evans suffers from extremely low self-esteem and the inability to establish appropriate sexual boundaries with people with whom he interacts. Mr. Evans learned his inappropriate sexual acting-out behaviors as a result of the modeling by the adults in his life.

51. Mr. Evans entered adolescence and adulthood without the educational and social skills necessary to function successfully in society. The absence of the skills necessary to function successfully was exacerbated by the physical disability of his blindness in his left eye. As a result of Mr. Evans' chronic drug and alcohol abuse, an attempt to self-medicate and to relieve his constant emotional and psychological pain, Mr. Evans was unable to hold a job. His lack of education also hindered his efforts to find suitable employment. Mr. Evans' counselors in the Methodist Youth Program observed in him the desire for employment and for a better life. It appears, however, that it was too late. Mr. Evans' social history presented him with overwhelming obstacles for which he received inadequate assistance throughout his life.

52. In my professional opinion, which I hold to a reasonable degree of certainty in my profession, as the result of the above factors, Mr. Evans was under extreme mental and emotional disturbance at the time of the offenses. The combination of Mr. Evans' drug and alcohol

addiction and his entry into adulthood with extremely limited abilities renders his contacts with the criminal justice system almost an inevitability.

FURTHER AFFIANT SAYETH NAUGHT.

/s/Arlene Messner-Peters, M.S.W., L.C.S.W.
Arlene Messner-Peters, M.S.W., L.C.S.W.

Subscribed and sworn to before me
this 6th day of November, 1996.

/s/Linda P. Lowes
Notary Public

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS, COUNTY DEPARTMENT,
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
Respondent,	)	
v.	)	No. 83 C 1164
JOHNNIE LEE EVANS,	)	
Petitioner.	)	

AFFIDAVIT OF DR. GERARD J. GIRDAUKAS

I, Dr. Gerard J. Girdaukas, being first duly sworn on oath, state the following:

PROFESSIONAL BACKGROUND

1. I am a clinical psychologist. I am licensed in the State of Illinois. I am in private practice at 3375 Arlington Heights Road, Suite A, Arlington Heights, IL 60004 and at 480 Elm Place, Suite 202, Highland Park, IL 62249.

2. I obtained my doctoral degree in psychology from Loyola University in 1988. Prior to obtaining my doctorate, I completed a doctoral internship specializing in chemical dependency assessment and treatment. I received postdoctoral training in clinical psychology, including forensic psychology. I also received specialized training in the assessment of neuropsychological dysfunction and brain injury. I have lectured on the causes and conse-

quences of sexual abuse for child, adolescent, and adult victims. I have testified as an expert in sex offense, juvenile homicide and adult capital offense cases.

3. A copy of my Curriculum Vitae is attached as Exhibit A.

PURPOSE OF REFERRAL

4. I was retained by Julie A. Bauer, Winston & Strawn, to evaluate Johnnie Lee Evans in order to present an intellectual and psychological profile of Mr. Evans; to determine his psychiatric diagnoses at the time of the offenses, including an opinion regarding the accuracy of the diagnosis of anti-social personality disorder; to render an opinion regarding the psychological evaluation conducted by Dr. Alan K. Rosenwald; to determine the severity of Mr. Evans' cognitive and emotional impairments; and to render an opinion regarding Mr. Evans' mental and emotional condition at the time of the offenses.

TESTS PERFORMED AND MATERIALS REVIEWED

5. I conducted testing on June 9, 1990, June 11, 1990, August 8, 1990 and August 27, 1991. I administered the following tests: Mental Status Examination, Clinical Interview, Minnesota Multiphasic Personality Inventory (MMPI), Halstead-Reitan Neuropsychological Test Battery, Weschler Adult Intelligence Scale-Revised (WAIS-R), and the Thematic Apperception Test (TAT). I reviewed the following documents:

a. Affidavit of Arlene Messner-Peters, dated November 6, 1996

b. Transcript of Mr. Evans' testimony at the sentencing hearing (TR 2816-2965 of the trial transcript)

c. Transcript of Dr. Alan K. Rosenwald's testimony at the sentencing hearing (pp. 2966-3042 of the trial transcript)

d. Reports of the Psychiatric Institute pertaining to Mr. Evans (Documents Nos. 300-370, 3687-3688)

e. Police reports relating to the Allen homicide (Documents Nos. 17-32)

f. Documents relating to Mr. Evans' statements to the police (Documents Nos. 213-224, 226)

g. Illinois Death Penalty statute, 720 ILCS 5/9-1.

6. Tests were conducted in a standardized fashion. The psychological tests I administered are routinely relied upon by mental health professionals in evaluating a person's mental functioning. Accordingly, the results reflected in this report are judged to be valid indicators of Mr. Evans' mental functioning. Mr. Evans devoted full attention and energy to all tasks such that the following results are believed to accurately reflect his intellectual and emotional functioning. There is no indication that he attempted to misrepresent his emotional and mental state and there is no evidence of malingering.

BACKGROUND INFORMATION

7. Mr. Evans is an African-American man who has been convicted of murder and attempted rape and has been sentenced to death. Mr. Evans was born on February 23, 1951 in Milford, Delaware. His mother abandoned him as an infant. From age one to age six, Mr. Evans was raised by a great-aunt whom Mr. Evans believed was his mother. The great-aunt was a migrant worker who travelled from

state to state picking cotton and other crops. The family was very poor, and living conditions were substandard. As a child, Mr. Evans was not allowed to play with other children but was required to work alongside his great-aunt in the fields.

8. From a very early age, Mr. Evans was exposed to, at least, inappropriate sexual behavior between the adults and the children in the family, and, at worst, incidents of incest. Mr. Evans' sexual history is marked by numerous pathological relationships with family members that began at a very early age. Mr. Evans recalls viewing sexual intercourse at a very early age, and by age four, he was mimicking intercourse with other children in the family. With the approval of the adults in the family, Mr. Evans engaged in voyeuristic behavior towards the female children in the family, particularly his cousin Diane.

9. When Mr. Evans was six, his great-aunt gave him to her daughter, Bessie and Bessie's husband, James, who lived in New Jersey. Living conditions in this family were also poor. Mr. Evans was frequently told that he ate too much.

10. Mr. Evans was also physically abused. He has a history of head injuries and trauma. As a child, he was pistol-whipped, beaten in the head with a bat frequently, and hit in the head with a wrench. He has scars from stitches as a result of this trauma.

11. At age fifteen, Bessie told Mr. Evans that he was going to live with his mother in Chicago. He never saw or heard from his aunt, whom he thought of as his mother, again. His mother resided in a three bedroom apartment in a housing project with his six cousins, a brother, and several sisters. Mr. Evans had not met or known of any of these people before arriving in Chicago.

12. Inappropriate sexual contact, including incest, was present in this household also. Mr. Evans and his younger sister Jeannette engaged in sexual foreplay and mimicked intercourse. Jeannette also engaged in this behavior with the male cousins living in the house. During the year Mr. Evans spent in the Job Corps, he was sexually assaulted by another young man. Mr. Evans returned from the Job Corps when he was seventeen years old; his sister Beverly came to live in the house. Mr. Evans became obsessed with having sexual relations with Beverly. When he was around nineteen years old, Mr. Evans was in an elevator with Beverly and began to fondle her. When she resisted, Mr. Evans stopped the elevators between floors and completely removed her undergarments. At this point, Beverly grasped his penis, but he lost his erection. However, when Beverly again resisted, he again achieved erection. It was also at age nineteen that Mr. Evans witnessed his friend Leon commit a rape. Mr. Evans' sexual assaults began after this time.

13. Although Mr. Evans was enrolled in elementary school at around age six, his education was sporadic because he was taken out of school several times for periods of time. Mr. Evans dropped out of school in tenth grade, although he later received his GED.

14. Mr. Evans began using alcohol at age fifteen and drank daily to intoxication after that. Mr. Evans' abuse of alcohol and drugs was apparently an attempt on his part to "self-medicate" (i.e., attempting to alter his mood with chemical substances readily available to him) in response to the stressors in the circumstances surrounding his life. At around age eighteen, Mr. Evans began using other drugs heavily. From age eighteen to twenty-three, he used LSD every day and heroin for about six months. On the day of

the offenses, Mr. Evans smoked marijuana, drank beer, and for the first time used PCP.

15. A mental status examination revealed Mr. Evans to be oriented to person, place, time and circumstance. Affect appeared to be blunted, but appropriate to the content of conversation discussed. There were no obvious disturbances in gross or fine motor movement. Mr. Evans denied any psychotic decompensation, including hallucinations or delusion. There was no disordered thinking in evidence. Regarding mood, Mr. Evans reported that he became angry with himself often. He reported wishing he had done something with his life. He said that he felt like committing sexual assaults only at times when he was sad or depressed. He related that on the day of the offenses, his mother was very sick and there was no food in the house. He reported that he liked children very much and wished he had been a better father than his own father. His mood ranged from being superficially jovial and compliant to quite sad and depressed. Notwithstanding, he denied having made any suicidal attempts, but reported a history of suicidal ideation.

16. Mr. Evans appeared to have poor attention and impaired immediate and long-term memory. Speech productivity was extremely high. He spoke rapidly and changed from subject to subject rapidly such that it was at times extremely difficult to follow his line of thinking. He denied any fugue states and dissociative experiences. As a result of head injuries, Mr. Evans has scars from stitches located in the right parietal and frontal area of the skull. Mr. Evans reported no history of seizure disorder.

INTELLECTUAL AND NEUROPSYCHOLOGICAL TEST RESULTS

17. On the WAIS-R, Mr. Evans achieved a Verbal IQ of 84, within the low average to borderline mentally retarded range of intellectual functioning, with an error of measurement of six points. He achieved a Performance IQ of 99, solidly within the average range of intellectual functioning. The scaled scores of the various subtests are as follows:

Verbal Subtest Scores		**Performance Subtest Scores**	
Information	8	Picture Completion	9
Digit Span	4	Picture Arrangement	11
Vocabulary	7	Block Design	8
Comprehension	9	Digit Symbol	9
Similarities	9		
Verbal IQ	84	Performance	99
Full Scale IQ	89		

The results of testing indicate that Mr. Evans is not psychotic or retarded but has significant and diffuse neurological impairments, probably chronic and longstanding. This is likely attributable to his chronic abuse of drugs and alcohol, together with the documented head trauma during his childhood. The finding of neurological impairments is indicated in several areas: first, Mr. Evans' long-term memory deficits; second, multiple incidents of head injury and trauma; third, the history of alcohol and drug abuse dating back to age fifteen; and fourth, Mr. Evans' test results. For example, while his IQ falls within the low average range, his inter-subtest scatter was quite significant. He did poorly in tests requiring information processing and memory recall. In addition, he did poorly in those portions of the mental status questioning which related to longer

term recall. This was indicated in his requests for repetition of simple and direct questions and his obvious difficulty in recalling important details of his childhood and adolescence. Mr. Evans' overall IQ profile reflects that of low average to average functioning. This was the case on tasks requiring abstract and common sense reasoning, mental alertness, and visual-motor activity. Even so, on these tasks demonstrating his best performance, his performance was poorer than 63% of his peers. His best result was on a task requiring social judgment on which his performance was better than approximately two-thirds of his peers. This result is attributable to Mr. Evans' mastering of the techniques necessary to survive both on the street and in prison.

18. Mr. Evans' profile, which has a fifteen point difference between Verbal and Performance IQ scores, indicates that his ability to problem-solve by anticipating various alternatives and choosing the most appropriate is significantly impaired. Mr. Evans' problem solving process can be characterized as an action-oriented one in which a course of conduct is chosen impulsively. Some persons do not have the ability to scan and consider a series of alternatives to a given action and choose the most useful alternative, rather than choose a "fight or flight" response that is chosen only by virtue of force of habit or impulse. In Mr. Evans' case, for example, his entire life was marked by impulsive, ill-conceived and harmful courses of action, as these were constantly modeled by significant others in his environment, beginning with the violent methods of childrearing chosen by his aunt and functional mother. Such a longstanding habit pattern is self-reinforcing and affords the individual no insight into the long-term consequences of his behavior. This tends to truncate his choices and eclipses his ability to comprehend the seriousness of actions by seeing only the short-term circumstances in

which he finds himself, and the quickest and most familiar way out.

Clinical research into juvenile homicide (American Psychiatric Association) divides causes of homicides into three groups: psychotics, antisocial psychopaths, and individuals who, like Mr. Evans, have committed homicides essentially as a result of a pattern of learned behavior, impaired in their reasoning either by poor familiar social norms and/or by organic impairment.

19. Mr. Evans' poorest performance occurred on tasks measuring his attentional skills. For example, his short-term memory was poorer than 95% of his peers. On another task requiring focusing and attention, his performance was again poorer than over 95% of his peers. These impairments are indicative of organic brain impairment — attention deficit-hyperactivity disorder, in particular.

20. Neuropsychological test results revealed a serious impairment with regard to attention, that is, the ability to screen out certain aspects of the environment and to perceive and process other aspects, and concentration, the ability to first maintain attention and secondarily to problem solve. These impairments are also found in individuals who suffer from emotional disorders.

21. Reality testing, or the ability to accurately view the demands of the environment, deteriorates for individuals who are either emotionally or intellectually impaired. Among the best examples of this are individuals who are suffering from Post Traumatic Stress Disorder, a psychiatric illness in which the individual's reality testing is severely impaired by flashbacks (a belief that they are actually re-experiencing a traumatic event), and delusional thought content, in which they are actually believing that their life is as endangered as it was during the traumatic

event, often having occurred years before, as with Vietnam (and other) war veterans. Mr. Evans' circumstances appear to be similar in that he re-experienced the feeling of powerlessness that he felt when victimized by his incestuous and physically abusive female family members, particularly when depressed, and attempted in part unconsciously to regain control and some semblance of his identity by sexually acting out.

22. Overall, the test results indicate serious and significant impairments of Mr. Evans' brain functioning. An orbital frontal syndrome is possible, with its most outstanding feature, namely disinhibition of impulsive behaviors. The frontal lobes control impulses by virtue of the functions of the frontal lobes, such as problem solving, sequencing ability, logic, analysis and synthesis. Damage to the frontal lobes results in disinhibition of these processes and an increase in the incidence of sexual and violent behaviors. Current research also implicates frontal lobe impairment with attention deficit-hyperactivity disorder. Individuals with attention deficit-hyperactivity disorder demonstrate a higher degree of substance abuse disorder and disorder of impulse control than normal adults.

PERSONALITY TEST RESULTS

23. Test results and interpretation of the tests for measures of personality reveal that a sense of dependence and helplessness as well as resentment at being at the mercy of others dominate Mr. Evans' profile. Other measures indicate a sense of victimization at the hands of those he thought would nurture and take care of him. These are indications of extremely low self-esteem and depression. Mr. Evans has a fear of intimacy which borders on dread and the idea of intimacy conjures for him a foreboding sense of guilt and inadequacy. Therefore, any attempts at intimacy are accompanied by mixed feelings of dread, re-

sentment, and a need to be in control. The extremely high elevation on Scale 4 of the MMPI reflects that Mr. Evans experiences the world as hostile and threatening, leading to his untrusting responses to it. His high depression subscale score speaks to a great extent to the remorse he feels and his guilt for what he has done. His extreme elevation on the MacAndrew Addiction Scale reflects Mr. Evans' need to self-medicate and cope with the painful emotions in his life through addictive behaviors.

24. Mr. Evans' psychological profile also strongly points to his highly confused and ambivalent feelings about his own sexual identity. Wholly dependent upon females all of his life and lacking any positive male role models, Mr. Evans' only male role model in his life appears to be the young man whom he witnessed committing a rape. Given this history, Mr. Evans' very distorted view of male/female relationships has been crystallized. Mr. Evans has very little sense of male identity, resulting from his history of sexual, physical, and emotional abuse. In this context, Mr. Evans' inability to recall the details of many instances of sexual and physical abuse to him is typical of individuals who have suffered chronic and severe abuse as well as physical trauma.

MENTAL STATUS AT THE TIME OF THE OFFENSE

25. In my opinion, which I hold to a reasonable degree of certainty in my profession, the above-described neurological impairments, the psychological and personality profile, and the intellectual and emotional deficits existed on January 22, 1983. These conditions in combination with the ingestion of alcohol and drugs resulted in significant difficulties in cognition, that is, in the abilities to appreciate and understand fully the long term consequences of one's actions, to think logically and strategically in

stressful situations, to utilize appropriate judgment, and to control one's impulses. Mr. Evans reported that on the day of the offenses, his mother was very sick and there was no food in the house. Based upon the available data, including test results, interview data, the client's presentation and social history, it is my opinion, which I hold with a reasonable degree of certainty in my profession, that at the time of the offense Mr. Evans was under extreme mental and emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired.

26. In my opinion, which I hold to a reasonable degree of certainty in my profession, the impulse disorder from which Mr. Evans suffers, which was demonstrated in his aberrant sexual behavior, resulted from a combination of organic brain impairment, which reduces impulse control and inhibits the generation of appropriate responses to his feelings of depression and abandonment; his dysfunctional sexual history, marked by sexual abuse and exposure to inappropriate sexual behavior at a very early age; and the further erosion of appropriate impulse control due to the use of mind-altering drugs on the day of the offenses. These drugs, PCP and alcohol, are well known for their powerfully disinhibiting effects on impulses, sexual and aggressive, in particular.

DIAGNOSTIC IMPRESSIONS

27. My diagnostic impressions, which I hold to a reasonable degree of certainty in my profession, are as follows: where needed for clarification of the above discussion, both DSM-III-R code types, in effect at the time of initial assessment, and DSM-IV code types, the current nomenclature, will be codified to designate the prior/existing diagnostic impressions:

AXIS I

DSM-III-R 300.40	Dysthymia
DSM-IV 300.4	Dysthymic Disorder
DSM-III-R 302.90	Sexual Disorder NOS
DSM-IV 302.70	Sexual Dysfunction NOS
DSM-III-R 310.10	R/O Organic Personality Syndrome
DSM-IV 310.1	R/O Personality Change due to neurological impairment, Disinhibited Type
DSM-IV-303.90	Alcohol Dependence, in Sustained Full Remission
DSM-IV 304.50	Hallucinogen Dependence, in Sustained Full Remission
DSM-IV 304.00	Opioid (Heroin) Dependence, in Sustained Full Remission
DSM-IV 305.90	Phencyclidine (PCP) Abuse, in Sustained Full Remission
DSM-IV 305.20	Cannabis (Marijuana) Abuse, in Sustained Full Remission

AXIS II

DSM-III-R 301.90	Personality Disorder NOS
DSM-IV 301.9	Personality Disorder NOS
DSM-III-R 314.00	Attention-Deficit/ Hyperacticity Disorder
DSM-IV 314.01	Attention-Deficit/ Hyperactivity Disorder, Primarily Impulsive/ Hyperactive Type

28. These diagnosis are appropriate and justified for the following reasons: the MMPI results, projective testing and clinical presentation substantiate a long-standing depressive disorder such as Dysthymic Disorder, characterized by chronic (more than two years') sadness, low self-esteem, low energy, and poor concentration. The neuropsychological results give evidence that this individual's depressive symptoms are related to a preexisting, chronic non-mood Axis I disorder, namely organic personality syndrome. According to DSM III-R, the presence of an organic personality syndrome (this diagnosis is renamed "Personality change due to neurological impairment, Disinhibited Type") is marked by emotional instability, e.g., marked shifts from normal mood to depression, irritability or anxiety; recurrent outbursts of aggression or rage that are grossly out of proportion to any precipitating psychosocial stressors; and markedly impaired social judgment, e.g., sexual indiscretions are particularly noted. Additionally, there is evidence from the history and tests of specific organic factors judged to be etiologically related to the disturbance in personality. Based upon the above discussion, Mr. Evans meets all of the above criteria.

The diagnosis of Sexual disorder NOS is met when an individual experiences marked feelings of inadequacy regarding sexuality, including behavior, performance, or attitudes, and distress regarding a pattern of repeated sexual behavior. This is consistent with Mr. Evans' clinical profile.

29. Mr. Evans does not meet nor has he in the past met the diagnostic criteria for sexual sadism. For such a DSM III-R or IV diagnosis to be met, an individual is required to experience over a period of at least six months recurrent intense sexual urges and sexually arousing fanta-

sies involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the person. In no interviews with any mental health professionals reviewed in the above legal documentation are there noted either intense sexual urges or fantasies involving acts where actual physical or psychological suffering of a victim is part of Mr. Evans' sexual experience, or engaging in such acts with a motive to derive satisfaction from the actual suffering of victims.

30. In my opinion, which I hold to a reasonable degree of certainty in my profession, a diagnosis of antisocial personality disorder is not accurate. Mr. Evans does not meet the diagnostic criteria for antisocial personality disorder. For such a diagnosis to be rendered, an individual must be diagnosed as one of a group of Conduct Disorders with onset before age fifteen. In none of the psychiatrists' or psychologists' records was any historical information included which would substantiate a diagnosis of Conduct Disorder.

The diagnostic category antisocial personality disorder in research and literature characteristically attributes an individual's illegal or malicious behaviors to interpersonal and intrapsychic personality traits that result in one's inability to empathize with others. Most often antisocials are seen as so narcissistically self-absorbed that they cannot emphasize with others. As a result, they have a marked tendency to act maliciously, in cold and calculated ways. They are typically seen as enjoying witnessing others' pain and ridicule and lacking remorse for their crimes. The causative factors for this diagnosis do not include organic factors.

Considering the above, Mr. Evans does not meet the traditionally accepted criteria for antisocial personality disorder, the DSM III-R or DSM-IV, diagnostic criteria.

PRIOR MENTAL HEALTH EVALUATIONS

31. As a result of my review of previous mental health examinations of Mr. Evans, it is my opinion that the diagnoses which resulted were incomplete and, therefore, inaccurate. Without a thorough review of social history and extensive intellectual, neuropsychological, and personality testing, an incomplete diagnosis can result. Upon review of the testing administered to Mr. Evans by mental health professionals prior to the current testing, it can be readily seen how incomplete diagnoses were rendered. No intellectual or neuropsychological assessment was reported, no social history taken, and no comprehensive psychological test battery administered. Organic/cognitive factors were not considered as potentially contributing causes to the aberrant behavior which occurred. It is my opinion, which I hold to a reasonable degree of certainty in my profession, that the additional information gained from this standard psychological test battery has contributed to a substantially different diagnosis of Mr. Evans.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Gerard J. Girdaukas, Ph.D.
Gerard J. Girdaukas, Ph.D.

Subscribed and Sworn to before me
this 5th day of November 1996.

/s/ Debra L. Gorczynski
Notary Public

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT

I, Dr. ALAN ROSENWALD, hereby state on oath that:

1. I am a clinical psychologist licensed to practice in the State of Illinois.

2. I testified in the death penalty hearing in People v. Johnnie Lee Evans and I stand by the testimony I gave in that proceeding, except to clarify the following:

a. When I was asked my expert opinion as to whether Johnnie Lee Evans was acting under the influence of extreme mental or emotional disturbance when the murder was committed, I was unable to couch my opinion in the language referred to because I did not have a definition of the term extreme and it is not a term generally used in my field of expertise.

b. If extreme mental or emotional disturbance is defined as less than insanity but more than the emotions of an average man, however inflamed, then I have no hesitancy in giving my expert opinion that Johnnie Lee Evans was acting under the influence of an extreme mental or emotional disturbance when the murder was committed.

c. If the term extreme is defined as very great, intense, or very severe, I have no hesitancy in giving my expert opinion

that Johnnie Lee Evans was acting under the influence of extreme mental or emotional disturbance when the murder was committed.

/s/ Dr. Alan Rosenwald
Dr. Alan Rosenwald

SUBSCRIBED AND SWORN TO
before me this 19th
day of October, A.D., 1988.

/s/ Ann T. Rowston
Notary Public

Supreme Court, U.S.
FILED
SEP 29 1999
OFFICE OF THE CLERK

(3)

No. 99-370

In the
Supreme Court of the United States

JOHNNIE LEE EVANS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review petitioner's claim that his constitutional rights were violated because his trial attorneys did not present mitigating evidence of an extreme mental or emotional disturbance sufficient to preclude a sentence of death.

Whether this Court should grant certiorari to review petitioner's claim that his constitutional rights were violated because his trial attorneys did not present certain evidence of non-statutory mitigating factors.

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The opinion of the Illinois Supreme Court is reported at *People v. Evans*, 186 Ill. 2d 83, 708 N.E.2d 1158 (1999). A copy of the opinion is contained in the Appendix to the Petition.

STATEMENT

I. The Trial

After a jury trial before the Honorable Joseph Urso, petitioner Johnnie Lee Evans was convicted of the 1983 murder and attempt rape of 16-year-old Adrian Allen. (TCR 3406) At trial, the People presented evidence showing that petitioner attacked three different women on elevators in Chicago Housing Authority ("CHA") apartment buildings during the week of January 16, 1983: Annie Webb, Maeline Mitchell, and the murder victim, Adrian Allen. Petitioner made statements to the police admitting that he attacked all three women. (TR 2034-2167) Both Annie Webb and Maeline Mitchell testified at trial. (TR 1935-40; 2002-15)

On January 22, 1983, two children discovered Adrian Allen's body in the elevator of a CHA apartment building at 3547 South Federal in Chicago. (TR 1700) Detective Robert Evans arrived to investigate and found a black female lying face down in the elevator, with her undergarments and jeans around her ankles. (TR 1686-88) A ski jacket, sweaters, and a bra were pushed up above her breasts. (TR 1690) There was a quantity of blood on the floor and smatterings of blood on the walls. (TR 1688) Crime lab Officer James Frankenbach viewed Adrian's body in the elevator and noted

that she had been stabbed repeatedly and there was blood all over the elevator. (TR 1735-37) The detectives recovered a red-stained coat liner from a garbage can on the 17th floor. (TR 1692)

The medical examiner testified about the victim's injuries. There were 17 stab wounds and 5 incised wounds, all of which could have been made with a knife. (TR 1657) There were several wounds to the chest and abdomen and additional wounds to the face and neck. (TR 1642-46) One of these wounds was particularly deep—it cut the windpipe and grooved the front of the spine—and another severed the anterior half of the jugular vein. (TR 1643-44, 1646)

Petitioner confessed his involvement in the murder of Adrian Allen in three separate statements. After petitioner's second statement, Detective Markham called for a felony review assistant State's Attorney, who interviewed petitioner and took a court-reported statement from him. (TR 1811-12) Petitioner said that when he pushed the stop button on the elevator, the victim "jumped" him and grabbed him around the neck, screaming. Petitioner pulled out a knife and told the woman to "be cool," that he intended to get off the elevator. The two fought over the knife and "tussled" when the knife fell to the floor. (TR 2127) The victim then told petitioner to do what he was going to do and get it over with, and she pulled down her pants. Petitioner said that before he could "get any—get ready to do anything," someone outside yelled for the elevator, and the victim "went berserk," screaming and struggling for the knife. Petitioner said that the victim was taller than him, and he pushed her back with the knife and cut her; he said that he did not know how many

times he stabbed her. (TR 2128) After the victim fell, petitioner "unstuck" the elevator and got off. He panicked when he noticed that his coat had blood on it, so he took the coat off and put the liner in the 16th floor garbage can and the coat in a can on the 15th floor. Petitioner went home, but then returned to the building and considered calling the police. (TR 2130) He decided not to call the police because he did not want to have to explain himself. (TR 2131) He eventually saw police on the 12th floor. (TR 2131)

Petitioner said that when he got on the elevator, he "didn't have anything in [his] mind." (TR 2134) He was on his way to see a woman on the 16th floor, and he was not paying much attention to the victim or the other man on the elevator. He explained, "So, I didn't have no intention to do anything, you know. But then when the man got off the elevator, you see what I'm saying, there it was, you know." (TR 2135)

The jury found petitioner guilty of murder and attempt rape, and the case proceeded to a death penalty hearing. (TR 2457-60)

II. Death Penalty Hearing

The trial court found petitioner eligible for the death penalty because he was over the age of 18, had killed Adrian Allen during an attempt rape, and had killed her with the knowledge and intent that his actions would cause death. (TR 2614) Therefore, the case proceeded to the aggravation/mitigation phase of the death penalty hearing.

***Aggravation*:**

In aggravation, the People presented the testimony of three other women petitioner had raped. Ruby Coleman Fitzpatrick testified that petitioner raped her in an elevator at 3547 South Federal on January 14, 1975. (TR 2620-28) Tina Yancy Williams testified that petitioner raped her in an elevator at 3617 South Federal on March 11, 1974; however, charges based on this incident were later dismissed. (TR 2659-62) Gail Carroll testified that petitioner raped her in an elevator at 3653 South Federal on May 12, 1978. During the attack, petitioner threatened that if she did not stop crying he was going to stick her 22 times because his knife was too small to kill her with one stab. Gail could hear petitioner flicking the knife. After the attack, petitioner sent Gail three or four letters, one including what she described as a "dirty picture." Petitioner also called her house collect from the county jail, and after he was convicted and sentenced for raping her, he sent a letter to her from the Joliet Correctional Center. (TR 2763-87)

Diane Smith testified that she met petitioner through his brother and the following day, petitioner came to her apartment and told her to put her kids to bed and have sex with him. When she told him to leave, he grabbed her around the neck and pulled out a knife. She struggled loose and grabbed her own knife, and her mother called the police. They struggled some more, as petitioner continued refusing to leave and threatening her with the knife. Petitioner returned the next day, and Diane subsequently signed a complaint against petitioner. (TR 2708-21)

Dr. Edmund Donoghue, the medical examiner who performed the autopsy on Adrian Allen, testified that Adrian was five months' pregnant at the time she was murdered; however, the pregnancy was not visible externally and he did not discover it until he conducted his internal examination. (TR 2647-50)

***Mitigation*:**

In mitigation, petitioner testified on his own behalf and also presented the testimony of a clinical psychologist. Petitioner gave a detailed description of his childhood. (TR 2816) Petitioner was abandoned by his mother when he was an infant and lived most of his childhood with his great-aunt, Bessie. (TR 2816-19) Bessie was a migrant farm worker, and they lived in several different homes with various families. (TR 2818-20) Petitioner testified that he was treated as an outcast and felt as though no one wanted him. (TR 2819)

Petitioner first attended school at the age of 7, but only stayed in school for half the term, and then he went into the hospital to have his left eye removed. (TR 2824) Petitioner began second grade when he was 9 years old, and he continued through eighth grade. (TR 2825) When petitioner was 14 years old, he learned that Bessie was getting welfare money for him, and he asked for some of it. (TR 2828) Petitioner and Bessie had an argument, and Bessie told petitioner that she was going to send him to live with his mother. (TR 2828-29)

When petitioner was 14 years old, he took a train from New Jersey to Chicago to live with his mother. (TR 2930) Petitioner's mother lived in a 3-bedroom

house on Princeton with petitioner's three sisters, two brothers, and petitioner's aunt and her six children. (TR 2834)

Petitioner testified that he was sexually assaulted by a stranger when he was fourteen. (TR 2846-48) Petitioner never told anyone about this until he was interviewed by a psychologist in preparation for the sentencing hearing. (TR 2849)

Petitioner joined the Job Corps when he was 16 years old. (TR 2853) He testified that he was the victim of sexual harassment while he was there, and was forced to have sex with "certain dudes." (TR 2853) At first, petitioner did not tell the counselors because he thought that there would be retaliation if he did so. (TR 2856) He later told a supervisor that he was being sexually harassed; however, petitioner refused to give any names, and therefore, the supervisor said that there was nothing he could do. (TR 2863)

When petitioner returned to the projects where his mother lived, she made him a "pallet" to sleep on because there was no bed for him. (TR 2866) Petitioner's mother got him a job at Evanston Hospital unloading food carts. Petitioner did not get along with one of the other workers, David Boxtail, who was the chief gang leader of the Disciples street gang. (TR 2868) Petitioner and Boxtail got into a fight, and when Boxtail told his supervisor, petitioner was told to quit, so he did. (TR 2869)

Petitioner married Betty Clanton in 1972, when he was 18 years old, and fathered two children. (TR 2875-76) While petitioner was in prison his wife lost custody of the children, and petitioner was unable to regain custody of them because he was in jail. (TR 2878)

Petitioner admitted committing all of the rapes with which he was charged, except for the rape of Tina Yancy. (TR 2880, 2882) As for the other victims, petitioner said that he "didn't mean to rape them women," and said that he did it because of "need of affection." He said that he raped them to prove that he was a man, because he wanted somebody to love him. (TR 2880) Petitioner said that he had a conversation with each of his victims, because he was trying to explain himself. (TR 2881)

Petitioner made a lengthy statement in allocution (TR 2896-2904), in which he denied his guilt: "And I'm still not saying that I did anything . . . ." (TR 2904) On cross-examination, petitioner continued to deny his involvement in Adrian Allen's death. (TR 2906) Petitioner said that he made the statement to the police to protect his family. (TR 2912) Petitioner said that Ruby Coleman and Gail Carroll were the only two women he ever tried to rape; however, he then admitted raping Loretta Brown. (TR 2914) Petitioner denied writing any letters to Paula Banks, but acknowledged that the Islamic name and prison identification number on the envelope were his. (TR 2915-17)

Petitioner testified that he wanted to plead guilty to murdering Adrian Allen and take a natural life sentence, even though he had nothing to do with the crime. (TR 2937) Petitioner could not say where he was at the time of the murder; however, he denied ever wearing the coat liner found at the scene, and said that it did not belong to his brother. (TR 2938) Petitioner claimed that all of the blood on his clothing and shoes had come from a small cut on his thumb which he suffered while he was washing dishes. (TR 2940)

When asked whether he felt the same need for affection at the sentencing hearing that he felt when he raped those three women, petitioner replied, "One would always feel lonely. We would always feel the need." (TR 2947) However, petitioner then said that he did not have a need to rape any more women. (TR 2948) Petitioner said that he did not have a bad temper, and he described himself as "easy going" and not violent. (TR 2959) Petitioner said that he considered rape to be a violent crime, but added, "And it all depends on how the act was committed." (TR 2960) He did not believe that the rapes of Loretta Brown, Ruby Coleman and Gail Carroll were violent crimes. (TR 2960)

Dr. Alan K. Rosenwald, a clinical psychologist, testified as an expert for the defense. (TR 2966, 2970). Dr. Rosenwald summarized his description of petitioner as "chronically a depressed human being who feels helpless, rejected, abandoned, unloved." (TR 2976) The doctor believed that there was some evidence of petitioner being "retarded psychomotor, on the psychomotor characteristic of a depressed person." (TR 2980) He explained that this meant that petitioner proceeds somewhat slowly in responding, which is not related to his general level of intelligence, but seems to be more of a slowdown as a result of his being depressed. (TR 2980) Dr. Rosenwald's data indicated that petitioner was obsessed with sexual thoughts and might have considerable difficulty in monitoring his sexual behavior. (TR 2982-83)

Dr. Rosenwald concluded that petitioner's repetitive history of rape was because petitioner was constantly seeking to affirm his own masculinity; the doctor be-

lieved that the rapes were an affirmation of maleness for petitioner. (TR 2990) He determined that "[a]ll of these things add up to a kind of psychopathology in the sexual area." (TR 2992) In summarizing his findings, Dr. Rosenwald described petitioner as a person of average intelligence who "leads a somewhat highly subjective life, whose capacity when emotional situations are not in play is able to conform his thinking to conventional standards." (TR 2992-93)

Dr. Rosenwald did not believe that petitioner did not understand what he was doing when he committed the rapes to which he admitted; however, he believed that petitioner did not see his acts of rape as violent. (TR 3002) He admitted that petitioner showed no remorse for the rapes he had committed. (TR 3008) Petitioner talked about being charged with murdering a woman, but said that he did not do it. (TR 3008) Dr. Rosenwald conceded that petitioner attempted to minimize his responsibility; he explained that because petitioner saw himself as a victim of society, he would not see himself as primarily responsible. (TR 3017)

When asked whether petitioner was acting under an extreme emotional or mental distress, the doctor responded: "Well if extreme is chronic, I have trouble with the term extreme. I think this is a long-standing mental disturbance, and that consequently there would be periods of time where he would be acting under extreme duress. That he has been chronically ill for many years." (TR 2993) Dr. Rosenwald testified that he was not asked to include in his report whether petitioner, at the time he committed the murder, was under the influence of an extreme emotional or mental disturbance. (TR 3029-30) He admitted, however, that he had

previously testified at a death penalty hearing, that he was aware of the factors in mitigation, and that he knew that one of those factors in mitigation was whether the petitioner committed the murder while he was under the influence of an extreme mental or emotional disturbance. (TR 3030) He said that he was told that the purpose of his examination was that the death penalty was being considered, but he was not told specifically to look for what particular circumstances might underlie that. (TR 3031) When asked a second time whether petitioner was under the influence of an extreme mental or emotional disturbance at the time of the murder, Dr. Rosenwald responded: "I believe, counsel, that referring back to the comments I made earlier, I indicated that it was highly probable that Mr. Evans was under emotional factors which could contribute to the crimes that he committed. That I questioned that I wasn't clear in my own mind what is meant by extreme." (TR 3031)

On cross-examination, Dr. Rosenwald conceded that petitioner did not suffer from any psychosis. He said that previous examinations by the Psychiatric Institute did not indicate that any psychiatrist or psychologist believed that petitioner suffered from a psychosis. (TR 2996-97) The predominant diagnosis in all the psychological reports dating back to 1969 was that petitioner was an antisocial personality. Dr. Rosenwald, however, disagreed with this diagnosis. (TR 3008) When asked whether he was informed of the purpose of the sentencing hearing, Dr. Rosenwald replied, "I was told to examine the petitioner, Mr. Evans, to evaluate him psychologically and possibly to make imprints backwards at the time that he committed the crime." (TR 2998)

Dr. Rosenwald testified that he believed petitioner would require lengthy periods of psychotherapy, but that there was a potential that he would respond to that. (TR 3036) He also stated, however, that without treatment, petitioner "is indeed a danger to society." (TR 3028)

The trial court found that there were no mitigating circumstances sufficient to preclude the imposition of the death penalty. The trial court specifically found "that the murder of Adrian Allen was not committed while [petitioner was] under the influence of an extreme mental or emotional disturbance, as it would preclude the imposition of the death penalty." (TR 3102) Accordingly, on June 11, 1984, petitioner was sentenced to death. (TR 3102) Petitioner was subsequently sentenced to 30 years' imprisonment on the attempt rape charge. (TR 3112)

On direct appeal, the Illinois Supreme Court remanded this case back to the trial court for the limited purpose of conducting a hearing into the question of racially motivated peremptory challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court conducted a *Batson* hearing and determined that petitioner had failed to make out a prima facie case of racial discrimination in the prosecution's exercise of peremptory challenges. The Illinois Supreme Court then addressed all issues raised in petitioner's direct appeal and ultimately affirmed his conviction in an opinion dated September 29, 1988. *People v. Evans*, 125 Ill. 2d 50, 530 N.E.2d 1360 (1988).

On June 27, 1990, petitioner filed a petition for post-conviction relief with the trial court, and on February

6, 1997, petitioner filed his amended petition for post-conviction relief. (CR 11) The State moved to dismiss petitioner's petition, and the trial court heard extensive arguments from both sides on the motion. (R D3-13) On May 17, 1997, the trial court dismissed petitioner's petition, finding that petitioner had failed to establish a substantial deprivation of his constitutional rights warranting post-conviction relief. (R E3-7; CR 186-94)

The Illinois Supreme Court affirmed the trial court's dismissal of petitioner's post-conviction petition in an opinion dated February 19, 1999. *People v. Evans*, 186 Ill. 2d 83, 708 N.E.2d 1158 (1999). Petitioner now asks this Honorable Court to review the ruling of the Illinois Supreme Court.

ARGUMENT

I.

PETITIONER'S POST-CONVICTION PETITION FAILED TO ESTABLISH THAT HIS TRIAL ATTORNEYS WERE INEFFECTIVE IN THEIR PRESENTATION OF MITIGATING EVIDENCE OF AN EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

Petitioner asserts that the Illinois Supreme Court erred in affirming the trial court's dismissal of his post-conviction claim of ineffective assistance of counsel at sentencing. Petitioner contends that his counsel acted incompetently in failing to present evidence to establish the statutory mitigating factor that petitioner acted under an extreme mental or emotional disturbance at the time of the crime. *See* 720 ILCS 5/9-1(c)(2) (West 1996) (formerly Ill. Rev. Stat. 1983, ch. 38, par. 9-1(c)(2)). On the contrary, the Illinois Supreme Court properly re-

jected petitioner's claim where petitioner failed to show that his counsel was ineffective under the two-pronged test set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). There is no need for this Court to grant certiorari to review the Illinois Supreme Court's application of the *Strickland* standard in this case.

The standard for assessing whether an attorney's performance at a capital sentencing hearing was constitutionally deficient is that set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). As applied to death sentencing hearings, the *Strickland* standard requires petitioner to show: (1) that his attorney's performance at the hearing was deficient, as counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating factors did not warrant death. *Strickland*, 466 U.S. at 687-88, 695.

In assessing counsel's performance a reviewing court must look to "not what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 794 (1987). The reviewing court presumes that counsel's challenged actions may have been sound trial strategy. *See Strickland*, 466 U.S. at 699 (counsel's decision to forgo a psychiatric evaluation presumed to be sound trial strategy, even though he later urged the sentencing judge to find the defendant had an extreme emotional disturbance). Further, "in all cases where the drawbacks of potentially mitigating evidence are obvious from the record, [the court] must presume that it was these drawbacks, and not merely

lack of diligence, which was behind counsel's decision." *People v. Caballero*, 126 Ill. 2d 248, 275, 533 N.E.2d 1089 (1989).

When the *Strickland* standard is applied here, it is evident that trial counsel's performance fell within the wide range of professionally competent assistance. Trial counsel developed a sentencing strategy to portray petitioner as the neglected and unwanted victim of an abusive childhood, who raped women in a misguided quest for love. Trial counsel obtained a psychological evaluation of petitioner by Dr. Alan Rosenwald, a psychologist with experience testifying in death penalty cases. Trial counsel elicited testimony from Dr. Rosenwald that petitioner had a "long-standing mental disturbance, and that consequently there would be periods of time where he would be acting under extreme duress," and that "it was highly probable that [petitioner] was under emotional factors which could contribute to the crimes that he committed." (TR 2993)

Petitioner claims that trial counsel was ineffective for failing to elicit specific testimony establishing the mitigating factor that petitioner was suffering from extreme mental or emotional disturbance at the time he committed the crime. It is important to note, however, that Dr. Rosenwald repeatedly testified that petitioner did not acknowledge to him that he had murdered Adrian Allen. Indeed, Dr. Rosenwald suggested that whether or not petitioner actually committed the crime was unimportant to his assessment of petitioner's psychological traits. (TR 2974, 3032, 3033) Yet, because petitioner did not acknowledge committing the crime, it certainly would have been difficult for Dr. Rosenwald to testify that petitioner committed the crime while suffering

from an extreme mental or emotional disturbance. Here, as in *People v. Sanchez*, 169 Ill. 2d 472, 662 N.E.2d 1199 (1996), petitioner took the witness stand during the sentencing hearing and denied that he killed Adrian Allen. (TR 2906) Under these circumstances, "[f]or counsel to have presented evidence of a mitigating mental state, as the defendant now suggests, would have been inconsistent with the theory of the defense." *Sanchez*, 169 Ill. 2d at 491. Thus, the Illinois Supreme Court observed, "A reasoned decision to make the best of a bad situation by pursuing a particular line of defense satisfies the constitutional minimum." *Evans*, 186 Ill. 2d at 96, *quoting Kokoraleis v. Gilmore*, 131 F.3d 692, 697 (7th Cir. 1997).

Furthermore, there is no reasonable probability that, absent counsel's alleged failure, the trial court would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *See Strickland*, 466 U.S. at 695. Prejudice must be assessed in a realistic manner based on the totality of the evidence. *People v. Coleman*, 168 Ill. 2d 509, 538, 660 N.E.2d 919 (1995). Accordingly, it is improper to focus solely on the potential mitigating evidence; the nature and extent of the evidence in aggravation must also be considered. *Coleman*, 168 Ill. 2d at 538.

Considering the evidence presented at sentencing, the totality of the aggravating and mitigating evidence, and the proposed mitigating evidence in Dr. Rosenwald's post-trial affidavit, there is no reasonable probability that, but for counsel's alleged error in not defining the statutory mitigating factors for Dr. Rosenwald, the death sentence would not have been imposed.

Initially, Dr. Rosenwald's post-trial conclusion that petitioner acted under an extreme mental or emotional disturbance at the time of the crime is dubious. Dr. Rosenwald first examined petitioner in May of 1984, more than a year after the crime. Furthermore, Dr. Rosenwald failed to consider the information in petitioner's confession, given two days after the murder. This information surely was the best evidence of petitioner's state of mind at the time of the crime; yet Dr. Rosenwald testified that he did not consider it important.

Petitioner's own statement indicates that there was no particular emotional trigger for his January, 1983 attacks on Annie Webb, Maeline Mitchell and Adrian Allen. On January 6, 1983, he happened to see Annie Webb and her two children waiting for an elevator. He followed them onto the elevator, jammed the elevator between floors, threatened Annie with karate sticks and raped her. (TR 1792-93) Two days later he happened to see Maeline Mitchell waiting for an elevator. Again, petitioner followed her onto the elevator, jammed the elevator between floors, threatened her with a knife, and raped her. (TR 1794-95) During his mitigation testimony, when asked why he chose elevators for the scene of his crimes, petitioner explained that it was "convenient," and remarked, "You know, you are going to commit no crime or whatever you do in the open or out there on the sidewalk. . . . I stopped the elevator to commit a crime." (TR 2926)

On January 22, 1983, petitioner again stopped the elevator to commit a crime. Petitioner was on the elevator with a man and a woman, and when the man got off the elevator, petitioner jammed the elevator between

floors and pulled a knife. (TR 1800) Notably, in his statements to the police and the Assistant State's Attorney, petitioner did not mention any stressful event that may have preceded this encounter. In fact, in more than one version of his statement, petitioner claimed that it was the victim, and not petitioner, who "went berserk," and that he had to stab her to protect himself. (TR 1809; 2128)

Petitioner's statement contains not even a hint of emotional disturbance. Instead, his statement demonstrates that he is a sexual predator who carefully orchestrates encounters with women in elevators because that is the most "convenient" place for him to rape them. Rather than claiming that he acted out of an emotional disturbance, petitioner said that when he got on the elevator, he "didn't have anything on [his] mind." (TR 2134) When the man got off the elevator, however, leaving petitioner with a prime criminal opportunity, as petitioner explained, "[T]here it was, you know." (TR 2135) Thus, petitioner's statement showed that, at the time of the crime, he was highly conscious of the improper nature of his actions and was able to reason well enough to plan his actions. Dr. Rosenwald's complete failure to consider this statement, or any of the facts of the crime, casts serious doubt on the validity of his conclusion.

In contrast to petitioner's proposed mitigation evidence, the trial court was faced with a great deal of compelling evidence in aggravation. Between March 11, 1974, and January 24, 1983, petitioner had been out of custody for a total of 71 days and had raped or tried to rape 8 different women, including the murder victim, Adrian Allen. (TR 3053-56) Tina Yancy testified that

petitioner raped her in an elevator with a knife on March 11, 1974. (TR 2654-62) Twenty days after petitioner was released from the county jail on the charges brought by Tina Yancy, he raped Loretta Brown in a CHA elevator. (TR 2915) One week later, he raped Ruby Coleman in a CHA elevator. (TR 2625-30) Petitioner was tried, convicted, and served time in the Illinois Department of Corrections. Only 9 days after his release from prison, petitioner raped Gail Carroll in a CHA elevator. (TR 2763-76) Once again, petitioner was tried, convicted, and served time in the Illinois Department of Corrections. When he was released this time, he began a crime spree. Only 24 days after his release from prison, petitioner raped Annie Webb in a CHA elevator. (TR 1934-64) The following day, petitioner brandished a knife and tried to rape Diane Smith. (TR 2708-12) The day after that, petitioner raped Maeline Mitchell in a CHA elevator. (TR 1996-2015) Four days later, petitioner killed Adrian Allen after attempting to rape her in a CHA elevator. (TR 2126-35)

The People presented additional evidence in aggravation showing that petitioner's prison behavior was far from exemplary. The overwhelming evidence in aggravation shows that the trial court's sentencing decision would have been the same even if Dr. Rosenwald had given the specific testimony contained in his affidavit. Most importantly, the trial court's order dismissing petitioner's post-conviction petition demonstrates that petitioner's proposed mitigation evidence would have had no impact at all on the trial court's sentencing decision. The judge who originally sentenced petitioner also ruled on his post-conviction petition, and that judge reviewed the mitigation evidence now presented and

clearly ruled that it would not have changed his mind about petitioner's sentence. (R C193) The trial judge made it clear that, with or without the additional evidence contained in petitioner's post-conviction petition and supporting affidavits, he would have sentenced petitioner to death.

In sum, petitioner cannot demonstrate that his trial counsel acted incompetently in failing to elicit specific testimony from Dr. Rosenwald that petitioner murdered Adrian Allen while suffering from an extreme mental or emotional disturbance, nor can he demonstrate prejudice from his counsel's actions. Accordingly, the Illinois Supreme Court properly affirmed the trial court's order dismissing petitioner's post-conviction claim of ineffective assistance of counsel.

II.

PETITIONER'S POST-CONVICTION PETITION FAILED TO ESTABLISH THAT HIS TRIAL ATTORNEYS WERE INEFFECTIVE IN THEIR PRESENTATION OF NON-STATUTORY MITIGATING FACTORS.

In his second contention, petitioner claims that his trial attorneys were ineffective in failing to present evidence of additional, non-statutory mitigating factors. In support of this claim, petitioner attached to his post-conviction petition affidavits from a social worker, Arlene Messner-Peters, and a clinical psychologist, Gerard Girdaukas. Ph.D. (App. 30-62) According to petitioner, these affidavits establish that if his trial counsel had performed competently, they would have presented evidence of his physical, sexual and emotional abuse during his childhood, as well as his impaired brain functioning. (Pet. 25)

Petitioner's current claim, like his Argument I, is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), which requires the petitioner to show: (1) that his attorney's performance at the hearing was deficient, as counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating factors did not warrant death. *Strickland*, 466 U.S. at 687-88, 695.

The Illinois Supreme Court has recognized that in some cases the available mitigating evidence is either so flawed or potentially damaging that a competent counsel may reasonably decide not to present it, while, in another case, counsel may decide that some potentially mitigating evidence would be merely cumulative. *People v. Caballero*, 126 Ill. 2d 248, 275, 533 N.E.2d 1089 (1989). The present case fits both of these categories.

Defense counsel's decision to present mitigation testimony from petitioner himself and from one psychologist cannot be deemed unreasonable. First, petitioner cannot establish that testimony like that presented in Ms. Messner-Peters' affidavit would have been available to him at the time of his sentencing hearing. Petitioner's sentencing hearing was held in 1984. Ms. Messner-Peters did not become a licensed social worker until 1989. Moreover, the Illinois Supreme Court has recognized that mitigation experts who compile social histories like that done by Ms. Messner-Peters in the

present case were rare, if they existed at all, during the time petitioner was sentenced. *See People v. Holman*, 164 Ill. 2d 356, 371-72, 647 N.E.2d 960 (1995) (mitigation experts not available in 1985).

Nonetheless, even were such testimony available, it would have been of little or no value to the sentencer. In *Stewart v. Gramley*, 74 F.3d 132 (7th Cir. 1996), the United States Court of Appeals for the Seventh Circuit rejected the proposition that all evidence of a defendant's background mitigates guilt, that "causality is mitigation." *Stewart*, 74 F.3d at 136. The court stated:

> [S]ince it obviously is not the theory of capital punishment that murderers are compelled to murder by their past and therefore should not be punished, it cannot be right that anything brought out at a death-penalty hearing is certain or even likely to help the defendant to save his life. What is brought out that will help him is what goes to show that he is not as "bad" a person as one might have thought from the evidence in the guilt phase of the proceeding. What is brought out that will hurt him is what goes to show that he is, indeed, as bad a person, or worse, than one might have thought from just the evidence concerning the crime.

Stewart, 74 F.3d at 136. That same court later noted that "neither defense lawyers nor state courts are bound by the Constitution" to subscribe to the view that causality is mitigation. *Holman v. Gilmore*, 126 F.3d 876, 883 (7th Cir. 1997). The evidence offered here, like that reviewed in *Stewart*, "adds colorful de-

tails possibly relevant under a *tout comprendre*[1] defense if one existed, but not calculated to make a judge or jury think [the defendant] less deserving of the death penalty." *Stewart*, 74 F.3d at 137.

This Court has repeatedly described evidence such as that now offered by petitioner as a "two-edged sword." *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 324 (1989). As the Illinois Supreme Court observed in *People v. Franklin*, 167 Ill. 2d 1, 27, 656 N.E.2d 750 (1995), although this type of evidence may evoke compassion, it may also demonstrate petitioner's dangerousness and show that his conduct is undeterrable. *See also People v. Ward*, 154 Ill. 2d 272, 336-37, 609 N.E.2d 252 (1992) (evidence about defendant's troubled childhood is not *per se* mitigating).

In the present case, the evidence contained in the Messner-Peters affidavit is not solely mitigating; portions of it are aggravating. For example, the affidavit states:

> When he was sixteen years old, Mr. Evans forced his sister Beverly to have oral sex with him in an elevator after he stopped the elevator between floors. After Beverly reported this incident to their mother, Ms. Richardson beat John with an electrical cord and called the police. He spent one night in a juvenile detention center and was released the following day to his uncle. His mother, who wanted Mr. Evans out of the household, registered him for the Job Corps. He waited at home, with the incestual

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[1] *Tout comprendre c'est tout pardonner*—roughly translated, "to understand all is to forgive all."

> (sic) relationship between Mr. Evans and Beverly continuing, until he left for the Job Corps.

(App. 40). The affidavit further indicates that petitioner was terminated from the Job Corps program after he "defended himself from a homosexual attack by attacking the man with a knife." (App. 40). The summary of petitioner's work history indicates that petitioner quit his job at a bakery after working there for only two days "because it was too cold to work in the section where he was placed and his manager had a hateful attitude." (App. 41). When petitioner did manage to secure a job as a messenger for the First National Bank of Chicago, he was fired "due to absenteeism." (App. 42) After marrying Betty Ann Clanton Pruitt and having two children with her, petitioner and his wife "abused drugs and alcohol," petitioner used marijuana daily and reported being intoxicated throughout the day. (App. 44)

Among Ms. Messner-Peters' conclusions was that petitioner's dysfunctional childhood resulted in "increased frustration and the inability to control aggressive behaviors" and "the association of love with violence and the inability to function under stress without aggression." (App. 45) Petitioner argues that if the sentencing judge had heard this evidence, he would have found petitioner less culpable and would not have sentenced him to death. The People disagree, and submit that the above evidence would only have reinforced a finding that petitioner could not control his aggression and was a danger to society.

Moreover, the testimony petitioner now says his attorneys should have presented would have been cumulative to that which was presented at the hearing.

See generally People v. Wright, 149 Ill. 2d 36, 50-51, 594 N.E.2d 276 (1992) (counsel deemed competent although he did not obtain cumulative evidence about the petitioner's mental health and troubled youth) and *Caballero*, 126 Ill. 2d at 275 (counsel may reasonably ignore mitigating evidence that is cumulative). Here, petitioner's testimony at the sentencing hearing spans 149 pages of the transcript. Petitioner went into great detail about how he was abandoned by his mother as an infant, was not loved by anyone and was considered a burden by his caretakers, was treated as an outcast, was physically, sexually, and emotionally abused, was hospitalized several times as a child and eventually had his left eye removed, was badly beaten as a teenager and required 36 stitches in his head, and was unable to find suitable employment as an adult. Most importantly, petitioner was able to provide a first-hand explanation of his feelings about all of this.

Dr. Rosenwald described petitioner as "a person who is chronically a depressed human being who feels helpless, rejected, abandoned and unloved." (TR 2978) He explained that petitioner did not know his mother until he was 14 years old, that he was told at the age of six that nobody really wanted him, that he had been sexually abused at the age of 4 and again at the age of 14, that petitioner had never met his father and that petitioner's birth was the result of his father raping his mother. (TR 2979) He further testified that petitioner's actions were expressions of someone who is searching for some kind of relationship. (TR 2988) Dr. Rosenwald concluded that petitioner's repetitive history of rape resulted from petitioner constantly seeking to affirm his own masculinity. (TR 2990-92) He testified that peti-

tioner had "a long-standing mental disturbance, and that consequently there would be periods of time where he would be acting under extreme duress" and that "he has been chronically ill for many years." (TR 2993) Dr. Rosenwald later added that "it was highly probable that Mr. Evans was under emotional factors which could contribute to the crimes that he committed." (TR 3031) He stated that his report indicated that petitioner felt helpless because his entire life had been full of frustration, rejection, abandonment and lack of love among other trauma, and that this, coupled with petitioner's being black, rendered him "a picture of impotent despair." (TR 3040)

In light of this comprehensive analysis of petitioner's background, the testimony petitioner now claims should have been presented would have been cumulative. The trial court was well aware of petitioner's troubled childhood and the effect that it had on him. Trial counsel could have reasonably concluded that testimony from petitioner's own mouth, affirmed by a psychologist, would have been most compelling.

Likewise, trial counsel could have reasonably determined that the evidence in Dr. Girdaukas's affidavit was unnecessary. Dr. Girdaukas specifically stated that "Mr. Evans is not psychotic or retarded," but described him as having "significant and diffuse neurological impairments, probably chronic and longstanding." (App. 53) Dr. Girdaukas's affidavit indicates that petitioner's Verbal IQ was 84, "within the low average to borderline mentally retarded range of intellectual functioning," while his Performance IQ was 99, "solidly within the average range of intellectual functioning." (App. 53) Additionally, while Dr. Rosenwald testified that petitioner

suffered from a "long-standing mental disturbance," he unequivocally stated that petitioner possessed "average intelligence" and described him as a "reasonably intelligent human being." (TR 2993, 2976, 3002) Indeed, petitioner testified that he had made substantial progress toward obtaining his Bachelor of Arts degree while he was in prison. (TR 2951)

The value of Dr. Girdaukas's testimony is questionable. Dr. Girdaukas's affidavit suggests that petitioner suffers from an "organic brain impairment," (App. 55); however, the affidavit does not indicate that he performed any physical examination, such as an EEG, X-ray, CAT scan, or MRI, to confirm any organic brain impairment.

Most importantly, presentation of evidence explaining why petitioner murdered Adrian Allen would have directly contradicted petitioner's own testimony expressly denying that he committed the murder. *See United States ex rel. Kokoraleis v. Director of the Illinois Department of Corrections*, 963 F. Supp. 1473 (N.D. Ill. 1997) (rejecting ineffectiveness claim where presentation of mitigation based on mental condition would have been inconsistent with defendant's sworn denial of the offense), *aff'd*, 131 F.3d 692 (7th Cir. 1997). Here, in petitioner's statement in allocution, he expressly denied murdering Adrian Allen. (TR 2904-07, 2911, 2938, 2945)

Petitioner further fails to establish prejudice, the second prong of the *Strickland* test. The evidence in aggravation established that between March 11, 1974, and January 24, 1983, petitioner had been out of custody for a total of 71 days and during that time he had

raped or tried to rape 8 different women, including the murder victim, Adrian Allen. (TR 3053-56) Each of the surviving women provided powerful testimony at trial and sentencing. Tina Yancy, Loretta Brown, Ruby Coleman, Gail Carroll, Annie Webb, and Maeline Mitchell all gave compelling accounts of how petitioner raped them in CHA elevators. (TR 2654-62, 2915, 2625-30, 2763-76, 1934-64, 1996-2015) Diane Smith testified that the day after petitioner raped Annie Webb, he came to her apartment, brandished a knife and tried to rape her. (TR 2708-12) Finally, the jury determined beyond a reasonable doubt that petitioner killed Adrian Allen after attempting to rape her in a CHA elevator. (TR 2126-35) Sixteen-year-old Paula Banks testified that petitioner wrote her threatening letters from prison. (TR 2787-95) Additional evidence demonstrated that petitioner's prison disciplinary record was poor, (TR 2787-95, 2635-39, 2668-83), and that he did not comply with the terms of his parole. (TR 2728-34, 2751-52) Faced with such overwhelming evidence in aggravation, petitioner fails to demonstrate that the trial court would not have sentenced him to death if the testimony of Dr. Girdaukas and Ms. Messner-Peters had been presented at the sentencing hearing.

The federal cases cited in support of petitioner's argument are inapplicable here, and the distinguishing factors in those cases are quite evident—the representation afforded the defendants in those cases fell far below what petitioner received in the present case. This Court has repeatedly affirmed death sentences in cases in which defense counsel did not offer any mitigating evidence whatsoever. *See Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114 (1987); *accord*, *Darden v. Wainwright*,

477 U.S. 168, 106 S. Ct. 2464 (1986) (decision to rely on simple plea for mercy instead of mitigating evidence deemed a reasonable tactical decision).

Petitioner's trial attorneys were not required to run down every lead in mitigation, however tenuous. In *Jackson v. Roth*, 24 F.3d 1002 (7th Cir. 1994), the Seventh Circuit reviewed an ineffective assistance claim where counsel did not call additional witnesses to testify at sentencing about the defendant's childhood and good character. In determining that the habeas petitioner had not demonstrated a constitutional violation, the court noted:

> [W]e do not think that the failure was a violation of minimum professional norms. We stress "minimum." A superb lawyer would of course have left no stone unturned, at least would not have left this stone unturned. Criminal defendants are not entitled, however, at least by the federal Constitution, to superb lawyers. Lawyers who are not superb do not always pursue low-probability avenues for helping their client even when high-probability ones are nonexistent . . . . [W]e do not think that the Constitution requires criminal lawyers to pursue low-probability prospects for acquitting their clients or getting the clients' sentences reduced.

Jackson, 24 F.3d at 1005. In the context of a capital sentencing hearing, an attorney has rendered reasonably competent assistance so long as he has portrayed his client as a "uniquely individual human being" to facilitate an individualized sentencing determination and provide the sentencer with a basis for imposing a penalty less than death. *See generally Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978 (1976).

Compare Kubat v. Thieret, 867 F.2d 557 (7th Cir. 1989) (cited in the Petition) (where defense counsel failed to present cohesive plea for mercy in closing and failed to present mitigation; his argument was "a rambling, incoherent discourse . . . that may actually have strengthened the jury's resolve to impose a death sentence," reviewing court found that representation at sentencing "amounted to no representation at all" since no effort was made to present defendant to the jury as a human being.)

Here, trial counsel tried to portray petitioner as abused, unwanted and unloved by his own family. He presented expert testimony in an effort to explain why petitioner's background would lead him to commit such a brutal and heinous act upon an innocent sixteen-year-old girl. Nevertheless, even if this evidence attempted to explain the reason for petitioner's inhuman actions, it did not excuse them. The trial court did not find such evidence to be sufficient to preclude what he believed to be the proper sentence: death.

In sum, petitioner failed to make a substantial showing of a violation of some constitutional right, supported by the record or affidavits filed with his petition, sufficient to warrant an evidentiary hearing on his post-conviction claims. Because petitioner failed to satisfy the *Strickland* test applicable to claims of ineffective assistance of counsel, the Illinois Supreme Court properly affirmed the dismissal of petitioner's post-conviction petition without an evidentiary hearing. Petitioner has not demonstrated any reason for this Court to review this case. Accordingly, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

Respondent, the State of Illinois, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

JOHNNIE LEE EVANS
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE STATE IMPROPERLY RELIES ON ILLINOIS AUTHORITY

In its Response, the State relies heavily on ineffective assistance cases decided by the Supreme Court of Illinois. *See, e.g.*, State Brief at 15 (relying on *People v. Sanchez*, 169 Ill. 2d 472, 662 N.E.2d 1199 (1996); State Brief at 20 (relying on *People v. Caballero*, 126 Ill. 2d 248, 533 N.E.2d 1089 (1989); State Brief at 21 (relying on *People v. Holman*, 164 Ill. 2d 356, 647 N.E.2d 960 (1995). Indeed, the State boldly asserts that "[t]he federal cases cited in support of petitioner's argument are inapplicable here[.]" (State Brief at 27)

The State's reliance on Illinois authority ignores the fact that the very basis of Mr. Evans' petition to this Court is the errors committed by the Supreme Court of Illinois in rejecting his claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. For this reason, the State's arguments based on Illinois authority must be rejected by this Court.

II. MR. EVANS WAS DENIED EFFECTIVE ASSISTANCE BY DEFENSE COUNSELS' FAILURE TO INVESTIGATE AND INTRODUCE AVAILABLE EVIDENCE THAT HE WAS ACTING UNDER AN EXTREME EMOTIONAL OR MENTAL DISTURBANCE AT THE TIME OF THE OFFENSE

The State's arguments in response to Mr. Evans' claim that he was denied effective assistance of counsel based on defense counsels' failure to investigate and introduce evidence that he was acting under an extreme emotional or mental disturbance are specious. Defense counsel did not investigate and weigh the merits of presenting evi-

dence of extreme emotional or mental disturbance, determine that the evidence was either unavailable, flawed or potentially damaging, and then strategically elect not to present the evidence in mitigation. Rather, the record makes clear that counsel decided to advance such a theory, but then failed to introduce evidence supporting it. Nor was defense counsel precluded from going forward with a theory of extreme emotional or mental disturbance because of Mr. Evans' denial of guilt, as the State claims. It was defense counsels' lack of diligence, rather than any drawback or strategy, which prevented them from introducing evidence of extreme emotional or mental disturbance. Further, the record in this case indicates that Mr. Evans was prejudiced by this error. Thus, the Supreme Court of Illinois erred in its application of *Strickland* to Mr. Evans' claim, and this Court should grant a writ of certiorari to rectify this error.

A. Defense Counsels' Failure to Present a Mitigation Defense Based on Available Evidence that Mr. Evans Was Acting under an Extreme Emotional or Mental Disturbance at the Time of the Offense Cannot Be Attributed to Trial Strategy

The original trial record clearly establishes defense counsels' tactical decision to rely on the statutory mitigating factor of extreme mental or emotional disturbance at the time of the offense. Immediately after Mr. Evans was found guilty, defense counsel asked for a continuance so that Mr. Evans could be examined by Dr. Rosenwald, whom they "expect[ed]. . . to testify in the mitigation phase." (TR at 2464) The next day, they followed up with a written motion for a continuance so that Mr. Evans could be examined by psychological and possibly psychiatric personnel. (TCR at 3352, TR at 2470-2473) In response to a

question from the court, defense counsel indicated that the purpose of the examination was "mitigation. I believe one of the factors in mitigation that extreme mental, emotional distress." (TR at 2471) Finally, in closing argument, counsel argued that the "basic reason" why Mr. Evans should not receive the death sentence was because he was acting under an extreme emotional or mental disturbance at the time of the offense. (TR 3074)

In addition, the State's conjecture that defense counsel was precluded from presenting a theory of extreme emotional or mental disturbance theory because of Mr. Evans' denial of guilt is belied by the record. During trial counsel's direct examination of Mr. Evans, she made no attempt whatsoever to elicit testimony that would support a theory of innocence or alibi. Nor did trial counsel call any other witnesses that would support such a theory. The very fact that trial counsel retained Dr. Rosenwald manifests their decision to present a theory other than innocence. If trial counsel had determined to present a defense of innocence or alibi, Dr. Rosenwald's testimony would have been wholly irrelevant to and inconsistent with that defense. Again, trial counsel's closing argument -- after Mr. Evans had testified and denied guilt -- nowhere attempts to establish an innocence or alibi defense; rather, counsel argued that the "basic reason" why Mr. Evans should not receive the death sentence was because he was acting under an extreme emotional or mental disturbance at the time of the offense. (TR 3074) These facts make clear that, contrary to the State's contention, trial counsel did not elect to present a defense of innocence or alibi. Rather, defense counsel intended to present a theory of extreme emotional or mental disturbance, but failed to investigate and introduce the evidence to support that theory.

B. Mr. Evans Was Prejudiced by Defense Counsels' Failure to Present a Mitigation Defense Based on Available Evidence that Mr. Evans Was Acting under an Extreme Emotional or Mental Disturbance at the Time of the Offense

The State's argument that Mr. Evans was not prejudiced by defense counsels' failure to investigate and introduce evidence of extreme emotional or mental disturbance is contradicted by the record.

First, the trial court's comments in imposing the death penalty demonstrate the prejudice Mr. Evans suffered due to his counsel's deficiencies. In its analysis of mitigation, the trial court specifically found that Mr. Evans was not acting under the influence of extreme mental or emotional disturbance at the time of the offense. (TR at 3101-3102) Unaware of the evidence supporting this mitigating factor, the trial court found that there were no mitigating circumstances sufficient to preclude the imposition of the death penalty. *Id.* The trial court then sentenced Mr. Evans to death. (TR at 3102, 3408)

Further, in affirming Mr. Evans' conviction and sentence on direct appeal, the Supreme Court of Illinois highlighted the fact that "nowhere in his testimony does Dr. Rosenwald specifically state that defendant operated under extreme mental or emotional disturbance at the time he committed the offense." *People v. Evans*, 125 Ill. 2d 50, 89, 530 N.E.2d 1360, 1376 (1988). The Supreme Court of Illinois also distinguished cases in which the trier of fact failed to consider uncontradicted evidence pertaining to a mitigating circumstance, noting that Mr. Evans had presented *no* evidence that he acted under the influence of an extreme mental or emotional disturbance at the time of the offense:

> Here, however, defendant simply failed to establish the *existence* of the mitigating factor by *any* evidence - uncontradicted or otherwise. He presented no testimony whatever that he operated under an *extreme* mental or emotional disturbance *at the time of the offense*, as required by the statute.

Evans, 125 Ill. 2d at 89, 530 N.E.2d at 1377 (emphasis added).

Finally, State misrepresents the failure of the circuit court to make a finding on the prejudice prong of the *Strickland* test on Mr. Evans' claim of ineffective assistance based on defense counsels' failure to investigate and introduce available evidence of extreme mental or emotional disturbance. (State Brief at 18-19) The circuit court concluded that "Evans has failed to satisfy to establish [*sic*] that trial counsel was deficient concerning the presentation of extreme mental or emotional disturbance evidence. Therefore, this claim must fail." (App. 26) The circuit court did *not* address the prejudice prong of the *Strickland* test to determine whether it would have sentenced Mr. Evans to death even if evidence of extreme emotional or mental disturbance had been presented. This fact, along with the other evidence in the record, demonstrates the reasonable probability that, but for the failure to present such evidence, Mr. Evans would not have been sentenced to death.[1]

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[1] The State contends that the aggravating evidence against Mr. Evans' was so great that there is no reasonable likelihood that he would not have received the death sentence. Foremost among the aggravating evidence that the State relies on is Mr. Evans' admission of guilt in the crime. The State's argument cannot be squared with its argument as to performance prong of

III. MR. EVANS WAS DENIED EFFECTIVE ASSISTANCE BY DEFENSE COUNSELS' FAILURE TO INVESTIGATE AND INTRODUCE OTHER AVAILABLE MITIGATING EVIDENCE

The State also has failed to refute Mr. Evans' claim that he was denied effective assistance based on defense counsels' failure to investigate and introduce available other available mitigating evidence.

First, the State asserts that defense counsel would have been unable to present the testimony that is set forth in Ms. Messner-Peters' affidavit because Ms. Messner-Peters was not licensed as a social worker until 1989, and because such mitigation experts were not common at the time of Mr. Evans' sentencing. (State Brief at 20) This argument misses the mark. Those facts would not have prevented defense counsel from investigating and introducing the vast amount of evidence -- school, medical, and employment records, and other such information -- that underlies Ms. Messner-Peters' analysis. Nor would they have prevented another licensed social worker or qualified expert from preparing the social history.

Next, the State attempts to cloak defense counsels' failure to investigate and introduce other available mitigating evidence under the disguise of trial strategy. "Strategy" does not absolve a defense counsel's error that stems from a failure to investigate and prepare the defendant's case. Specifically, a defense counsel's strategic determination not to introduce potentially damaging mitigation evidence can

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the *Strickland* test, under which Mr. Evans' denial of guilt allegedly absolved defense counsels' failure to present a mitigation defense based on evidence of extreme emotional or mental disturbance.

only occur after counsel has, in fact, investigated and weighed the value of the evidence. As the Seventh Circuit Court of Appeals has stated in this context:

> Such a determination can rationally be made, however, only after some inquiry or investigation by defense counsel. This does not mean that only a scorch-the-earth strategy will suffice . . . but it does mean that the attorney must look into readily available sources of evidence. Where it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate it will be ineffective assistance.

Hall v. Washington, 106 F.3d 742, 749-750 (7th Cir. 1997). The record in this case does not reflect any effort on defense counsels' part to investigate the plethora of additional mitigating evidence that is contained in Mr. Evans' post-conviction petition, even though the evidence was available at the time of sentencing. Accordingly, defense counsel cannot have considered the merits of such evidence, determined that the evidence was potentially damaging or cumulative, and then strategically determined not to introduce it. This error falls below an objective standard of reasonableness, and the State's "strategy" argument must fail.

For example, defense counsel waited until *after* Mr. Evans was convicted to investigate any potentially mitigating evidence, including evidence that Mr. Evans was acting under extreme emotional or mental disturbance at

the time of the offense.[2] Courts have relied on this factor to sustain a finding that defense counsel's performance was deficient. *See Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995) ("[T]he lawyers made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty. . . . This inaction was objectively unreasonable.") *cert. denied*, 519 U.S. 1067 (1996); *Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir. 1991) ("To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available.").

Further, the State asserts that the other available mitigating evidence would have been cumulative. (State Brief at 25) The Messner-Peters and Girdaukas affidavits are replete with evidence that was not introduced at the sentencing hearing. Among other things, the court was not presented with Mr. Evans' school, medical, and employment records, as well as evidence of the impairment of Mr. Evans' brain functioning. While the State contends that many of the records simply reiterate Mr. Evans' testimony about his educational, medical and employment background, the documents both support Mr. Evans, whose credibility was attacked on cross-examination at trial (TR at 2962 (Q: "Would you lie to save your life?")) and contain new, mitigating details, such as Mr. Evans' efforts to find employment and the factors beyond his control which hindered his ability to find a suitable job. (App. at 42) In addition, the social history prepared by Ms. Messner-Peters

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[2] Mr. Evans was convicted on May 2, 1984. (TR at 2457) At that time, defense counsel requested a continuance to retain Dr. Rosenwald to examine Mr. Evans. (TR at 2464) Dr. Rosenwald interviewed Mr. Evans on May 18, 1984. (TR at 2970)

was based on extensive documentation and on interviews with Mr. Evans' family members. At trial, the State criticized Dr. Rosenwald for failing to obtain and consider precisely this type of information. (TR at 3024-3025) Most significantly, for the first time, both Ms. Messner-Peters and Dr. Girdaukas have explained the effects of Mr. Evans' background on his social, emotional and psychological development. Thus, this evidence provides a more comprehensive and detailed picture of Mr. Evans' background than what was presented at sentencing, and therefore is not cumulative.

Finally, the State asserts that, even if defense counsel was deficient in failing to introduce the mitigating evidence set forth in the Messner-Peters and Girdaukas affidavits, there is no reasonable probability that Mr. Evans would not have been sentenced to death. The State rehashes the aggravating evidence that was presented against Mr. Evans and assumes that the additional mitigating evidence would not have persuaded the court to sentence Mr. Evans differently. (State Brief at 26-27) This argument ignores the paramount importance of mitigating evidence in capital cases under the Illinois death penalty statute. *See People v. Perez*, 148 Ill. 2d 168, 194, 592 N.E.2d 984, 996 (1989) ("Mitigating evidence is extremely important under the Illinois capital sentencing scheme. Once an aggravating factor is found sufficient to impose the death penalty, there must be mitigating evidence sufficient to preclude the imposition of the death penalty."); *People v. Ruiz*, 177 Ill. 2d 368, 388, 686 N.E.2d 574, 583 (1997) ("This court has acknowledged the critical importance to the sentencing decision of evidence of a capital defendant's background and any mental or emotional problems that afflict him."); *People v. Coleman*, 168 Ill. 2d 509, 537, 660 N.E.2d 919, 934 (1995) (same). Here, there can be no gainsaying the potential effect that the additional mitigating evidence might have had

on the court's decision to impose the death sentence. Indeed, in dismissing this count, the circuit court does not appear to have considered the substance of Ms. Messner-Peters or Dr. Girdaukas' proffered testimony before rejecting this claim. (App. at 26-27) Accordingly, there exists a reasonable probability that, had counsel introduced the evidence, the court would have sentenced Mr. Evans differently.

CONCLUSION

For all of the foregoing reasons, this Court should grant Mr. Evans' petition for a writ of certiorari.

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